CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

The State of Missouri

AT THE

OCTOBER TERM, 1882.

CONROY v. THE VULCAN IRON WORKS, *Appellant.*

This case having been re-tried in accordance with the rules laid down by this court on a former appeal, and no new points being involved in the present appeal, the judgment is affirmed.

Appeal from St. Louis Court of Appeals

AFFIRMED.

Cline, Jamison & Day for appellant.

James C. McGinnis and *Finkelnburg & Rassieur* for respondent.

RAY, J.—This cause was in this court once before, and will be found reported in 62 Mo. 35. It was sent back to the circuit court, and after a re-trial was carried to the St. Louis court of appeals, and will be found reported in 6 Mo. App. 102. From that court, it is again here by appeal. When the case was here before, all the vital questions now presented, were then fully considered and decided by this court. The same points were again presented and urged before the St. Louis court of appeals, where the views of this court, as expressed when the case was here before, were fully recognized and re-applied by that court, as the law of this case, and we are again called upon to consider the same questions. As the case seems to have been re-tried in accordance with the rules laid down by this court on the former appeal, and as no new points are involved in the present appeal, we deem it sufficient to refer to that opinion, and to say that we adhere to the rulings heretofore made, and re-applied to the case, both by the trial court and the court of appeals, as before stated.

Plaintiff's original brief, in this court, presents no point not urged before and passed upon by the court of appeals, or by this court, in the opinions cited. In a supplemental brief, however, our attention is called to a recent decision of the Supreme Court of the United States, by Justice Harlan, in the case of the *Pennsylvania Company v. Joseph E. Roy*, 102 U. S. 451; *s. c.*, 20 Am Law Reg. 245; touching the competency and admissibility of a certain question and answer, as to the number of the plaintiff's children, etc. In that opinion, however, we see no sufficient reason to reverse this cause or depart from the rulings of this court heretofore made on that and kindred questions. *Winters v. Hann. & St. Jo. R. R. Co.*, 39 Mo. 475. The doctrine of that case has frequently been recog-

nized and acquiesced in, in other cases coming before this court since then.

For these reasons the judgment of the St. Louis court of appeals is affirmed. All the judges concur.

NAGEL v. THE MISSOURI PACIFIC RAILWAY COMPANY, *Appellant.*

1. **Railroads**: LIABILITY FOR UNGUARDED TURN-TABLE. To hold a railroad company liable for the consequences of its negligence in leaving a turn-table unfastened and unguarded, it is not necessary to show that the company was the owner of the turn-table. It is sufficient if it appears that it was in the charge or under the control of the company.

2. ——: ——: PLEADING. The petition in the present case stated in substance that the defendant railroad company "used and operated" a turn-table in connection with its railroad, and that it was the duty of the company to keep the turn-table locked and fastened. *Held*, that these averments were equivalent to a charge that the defendant controlled the turn-table.

3. ——: ——: INJURIES TO CHILDREN PLAYING ON TURN-TABLE. It is negligence on the part of a railroad company to omit to secure its turn-tables so that children cannot revolve them. If a child is injured in consequence of such an omission, the company will be liable, and the fact that the turn-table was being revolved by other children at the time will make no difference.

4. **Negligence**: WHEN A QUESTION FOR THE JURY. The rule is that whether a person injured by the negligence of another was exercising ordinary care, is a question to be determined by the jury, either where the facts are disputed, or where there is a dispute or reasonable doubt as to the inferences to be drawn from undisputed facts.

5. **Action for Personal Injuries**: VERDICT. To authorize a verdict for substantial damages in an action by a parent for the negligent killing of his infant child, it is not necessary to make proof of the amount of damages sustained. The jury may infer this from all the facts in evidence.

6. ——: MITIGATING AND AGGRAVATING CIRCUMSTANCES. It seems that a general instruction to the jury, in an action by a parent for the negligent killing of his infant child, that in determining the

amount of the verdict they should have "regard to the mitigating and aggravating circumstances," is bad; the instruction should designate what circumstances are to be considered as mitigating or aggravating damages. But if there are no mitigating circumstances in evidence, the defendant cannot complain of such an instruction for its generality.

7. ———. If an injury received through the negligence of the defendant be the immediate cause of the death of the injured person, the fact that he was unskillfully treated and that this contributed to his death will be no defense to an action by the next of kin.

Appeal from Cole Circuit Court.—Hon. E. L. Edwards, Judge.

Affirmed.

Thos. J. Portis and *H. S. Priest* for appellant.

The petition did not state facts sufficient to constitute a cause of action. It was nowhere alleged that defendant owned or in any manner controlled the turn-table, or that it had any right or authority to control it. A mere allegation that defendant used and operated said turn-table is not sufficient. If defendant did not own or control the turn-table, it could not be held liable for the neglect or failure of the owner, or person controlling the same, to keep it fastened or so secured as to prevent children from being injured by it. For aught that appears in the petition, the defendant only used the turn-table permissively, at the option of the owner thereof, as an occasional, or even continuous accommodation from the owner, in which case no obligation or duty devolves upon the defendant, which would render it liable to plaintiffs in this action. The conclusion of such a use is as legitimately and naturally inferable from the charges in plaintiffs' petition as that of a state of facts or such use as would make defendant liable. Again, the allegations in the petition clearly show that the boy was injured by the acts of others and not by the acts of defendant.

2. No doubt can exist upon the evidence that the

boy's death was not a necessary or natural result of the wound, but of the improper treatment of the physicians attending him, and bad nursing and want of proper dressing of the wound, etc. We, therefore, insist that the defendant should not be held responsible for the death, which was not the proximate result of the wound even if defendant caused said wound.

3. The plaintiffs were guilty of contributory negligence. The mother entrusted the child to another person of her own selection, (Alice,) such other person's acts are the acts of the mother, and negligence on such other person's part is the negligence of the mother. *Bell. R. R. Co. v. Snyder*, 18 Ohio St. 399; *s. c.*, 24 Ohio St. 670; 2 Thompson Neg., 1191; *O'Flaherty v. Railway Co.*, 45 Mo. 70; *Stillson v. R. R. Co.*, 67 Mo. 671; *Waite v. N. E. R'y Co.*, 28 L. J., Q. B. 258; 96 Eng. C. L. 728.

4. No damage having been proved, none should have been found. The general rule is that "the proper measure of damages is the value of the child's services, until he attains his majority, from the time of the injury, less the expense necessary for his support and maintenance, taken in consideration with his expectations of life." 2 Thompson Neg., 1292 (3). And nursing, medical attendance and funeral expenses can be recovered if specially pleaded and proved. Ib., 1293 (4). But neither was alleged or proved in this case. In general, under these statutes, the principle under which damages are to be assessed is that of pecuniary injury, and not as a *solatium*. No compensation can be given for wounded feelings, mental or physical pain, or the loss of comfort and companionship of a relative. *Blake v. R'y Co.*, 18 Q. B. 93; *s. c.*, 21 L. J. (Q. B.) 233; *Burke v. R. R. Co.*, 10 Cent. L. J. 48; *State v. R. R. Co.*, 24 Md. 84, 107. In actions under statutes giving a right of action to husband or wife, or parents, brothers and sisters, for the death of a husband, or wife, or parent, or son, or brother, or sister, it seems well settled that the damages provided for and recoverable under them are only such as are pecun-

iary and actual, or fixed in amount by the statutes, and not exemplary, and not on account of the mental suffering of the deceased, or for the sorrow, grief or suffering of the sorrowing relatives who may be entitled to recover. *Porter v. R. R. Co.*, 71 Mo. 83; *Rains v. R. R. Co.*, 71 Mo. 164. Such being the case, the recovery in this case is limited to actual damage, and none having been proved, none can be recovered, or at most, only nominal damages, and the court should have so instructed the jury. 2 Thompson on Neg., 1293 (5); *Brown v. Emerson*, 18 Mo. 103; *Owen v. O'Reilly*, 20 Mo. 603. Father may recover for services of a minor son until he would have been twenty-one years old, whatever the proof shows the services worth. *Ford v. Monroe*, 20 Wend. 210; *Drew v. R. R. Co.*, 26 N. Y. 49. Where it was an infant child, whose service was of no value, only physician's bill and funeral expenses, etc., should be recovered. *Pack v. Mayor*, 3 Comst. 489. As the damages should be confined to compensation for the pecuniary loss, it is erroneous to leave the question of the amount to the uncontrolled discretion of the jury. Sedg. on Damages, (6 Ed.) 698, note; *Pa. R. R. Co. v. Vandever*, 36 Pa. St. 298; *Pa. R. R. Co. v. Ogier*, 35 Pa. St. 60; Field on Damages, 498. In cases arising under the third section of the damage act, the jury should not be left to grope their way unaided through the testimony, to find the circumstances of mitigation or aggravation, which the statute authorizes them to take into consideration in making up their verdict. What circumstances will mitigate or aggravate a wrong done, is a question of law, and if any such circumstances exist, they should be pointed out by the court, and the jury should be restricted to a consideration only of those so designated. *Porter v. R. R. Co.*, 71 Mo. 83; *Rains v. R. R. Co.*, 71 Mo. 169.

Botsford & Williams and *M. J. Leaming* for respondents.

1. The petition is sufficient, and the company's de-

murrer thereto was properly overruled. Ownership of the turn-table by appellant was not necessary in order to make it liable for using it and negligently leaving it unlocked and unguarded to the injury of others. *Fletcher v. R. R. Co.*, 1 Allen 9; Shearman & Redfield Neg., (2 Ed.) 501, 504. The words "use and operate," and "using and operating," which are employed in the petition, are terms used in the statutes of this State defining the duties and creating the liabilities of railway companies, (R. S. 1879, §§ 809, 810, 818, 832, 834, 844,) and the refusal of the court to give appellant's instructions three, four, five and ten, based on the same grounds as were contained in the demurrer to the petition, was proper. *Stetler v. R. R. Co.*, 46 Wis. 502; *s. c.*, 49 Wis. 613; *Jetter v. R. R. Co.*, 2 Keyes 154; *Stanton v. Bridge Co.*, 47 Vt. 172; 14 Am. L. R. 469. The fact that appellant may not have owned the turn-table, but used it wrongfully as a trespasser, did not exempt it from liability if it left it in such condition as to kill respondents' child.

2. The action of the court in submitting to and not withdrawing from the jury the issue of contributory negligence on the part of respondents, was proper. *Thompson v. R. R. Co.*, 51 Mo. 190; *Buesching v. Gaslight Co.*, 73 Mo. 219; *Hicks v. R. R. Co.*, 64 Mo. 430; *Boland v. R. R. Co.*, 36 Mo. 491; *Wyatt v. R'y Co.*, 55 Mo. 485; *Norton v. Ittner*, 56 Mo. 352; *Owens v. R. R. Co.*, 58 Mo. 393; *Smith v. R. R. Co.*, 61 Mo. 592; *Stoddard v. R. R. Co.*, 65 Mo. 521; *Mauerman v. Siemerts*, 71 Mo. 105; *Langan v. R. R. Co.*, 72 Mo. 397; *Kelley v. R. R. Co.*, 50 Wis. 385; *Hoyt v. Hudson*, 41 Wis. 105; *Railroad Co. v. Fuller*, 17 Wall. 569; *Railway Co. v. Fitz Simmons*, 22 Kas. 686; *Railway Co. v. Bohn*, 27 Mich. 503; *s. c.*, 12 Am. L. R. 745; *Railway Co. v. Pointer*, 14 Kas. 53; *Railroad Co. v. Hotham*, 22 Kas. 49, 50; *Johnson v. R. R. Co.*, 20 N. Y. 74; Wharton on Neg., §§ 420, 425, 427; Cooley on Torts, p. 670. And appellant's instructions seven and eight were, therefore, rightfully refused.

3. The leaving unguarded and unlocked a heavy turn-table for the revolving of locomotive engines, so that it could be easily turned by a boy ten years old, in an open space of ground near a large flouring mill, the city gas works, dwelling houses and shops, in the midst of the principal play-ground for the boys of a city of 5,000 people, where circus managers pitched their tents and exhibited their shows, and under the shadow and within a stone's throw of the State capitol, and after the company's agents had been informed of previous injuries to other boys thereon, was grossly negligent and fully warranted the verdict and judgment below. Respondents' first instruction was, therefore, properly given, and appellant's instruction number 6 was rightfully refused. *O'Flaherty v. R'y Co.*, 45 Mo. 73; *Koons v. R. R. Co.*, 65 Mo. 597; *Stout v. R. R. Co.*, 17 Wall. 657; *s. c.*, 2 Dill. 294; *s. c.*, 11 Am. L. R. 226; *Keffe v. R'y Co.*, 21 Minn. 207; *Railway Co. v. Fitz Simmons*, 22 Kas. 690; *Railway Co. v. Kellogg*, 94 U. S. 474.

4. The absence of proof of special pecuniary damage to respondents resulting from the death of their child would not have justified the court in giving the instruction asked by appellant, number 12. *Ihl v. R. R. Co.*, 47 N. Y. 321; *Oldfield v. R. R. Co.*, 14 N. Y. 310; *O'Mara v. R. R. Co.*, 38 N. Y. 445. And respondents' eighth instruction, being in the language of the statute, (§ 2123,) and of a like instruction given in the case of *Owen v. Brockschmidt*, 54 Mo. 287, was properly given.

NORTON, J.—This is an action for the recovery of damages for the death of plaintiffs' infant son Albert, which is alleged to have been caused by the negligent acts of defendant. It is alleged in the petition that on the 27th day of May, 1878, defendant owned and operated a railroad through the City of Jefferson, and in connection therewith used and operated a turn-table so constructed and arranged as to be easily turned round and caused to revolve; that

said turn-table was situated in an open and public place in said City of Jefferson; that children were in the habit of resorting to said turn-table and going upon the same to play; that said turn-table was unfastened, without locks and unprotected by inclosures or otherwise, so as to prevent its being turned round at will by small children—of all which defendant had knowledge, and of the unsafe and dangerous condition of said turn-table; that the son of plaintiffs, who was a child of tender years, without judgment or discretion above children of his own age, was by the wrongful acts and neglect of said defendant, in permitting said turn-table to remain unguarded and unfastened, and while said turn-table was being revolved by other children, so injured and wounded that he died from the effects thereof.

The defendant in the answer denies each allegation of the petition, and avers that the injury and death of the son of plaintiffs was caused by the negligence and carelessness of the child, and also by the carelessness and neglect of plaintiffs directly contributing to the injury.

Upon the trial of the cause plaintiffs obtained judgment for the sum of $1,050, from which defendant has appealed, and assigns as the chief grounds of error the action of the court in overruling defendant's objection to the introduction of any evidence, and in giving improper and refusing proper instructions.

The objection to the introduction of evidence was based upon the alleged ground that the petition failed to state a cause of action, in this, that it did not allege that defendant was the owner of the turn-table or controlled the same at the time the injury, which occasioned the death of the child, was received. If ownership of the turn-table were necessary to fasten liability on the defendant for not keeping it so guarded that children who might be enticed to it, could not revolve it, as a plaything, to their injury, then the objection made would be well grounded. But we do not so

1. RAILROADS: liability for unguarded turn-table.

understand the law, and have been cited to no authority which sustains the proposition; but on the contrary we have been cited to the case of *Fletcher v. Railroad Co.*, 1 Allen 9, and Shearman & Redfield on Negligence, 501, 504, where the rule is laid down that ownership in such cases is not the test of responsibility, and that if enough appears to show that the party sought to be made liable had the property in his charge or under his control on which the nuisance complained of existed, it is sufficient.

The petition, we think, states enough to bring it within the operation of the above principle. It charges that at the time of the injury and for a long time previous thereto, defendant owned and operated a railroad, and in connection therewith "used and operated during the times aforesaid, and still uses and operates, a turn-table located in an open and public place in the City of Jefferson, and that it was the duty of defendant to keep said turn-table fastened, locked, inclosed or in some other way protected, so that children could not have access thereto, revolve the same, and thereby receive injuries." While the petition is subject to verbal criticism, in that it does not aver in express terms that defendant had in its charge or under its control the turn-table, still the averment that it used and operated the same in connection with a road owned by it, and that it was its duty to keep it locked and fastened, may be considered as equivalent to charging that defendant controlled it. Certain it is that the exclusive use and operation of such a structure is the highest, if not conclusive, evidence that a person so using it has it in his charge and under his control. The same form of expression is used in various statutes of the State creating duties and imposing liabilities on railroad companies. The words employed are "running or operating," "managing or operating," and are evidently used in the sense of controlling or having in charge. R. S. 1879, §§ 809, 810, 832, 834, 844.

2. ——: ——: pleading.

It is also urged that the objection to the admission of

evidence should have been sustained because the petition shows that plaintiffs' son was injured by the acts of other children in revolving the turn-table. This point, we think, is not well taken. If defendant was negligent in not securing the turn-table, so that it could not be revolved by children, to their injury, the mere fact that it was revolved by other children who were playing upon it at the time the child was injured, will not excuse defendant, if such act ought to have been foreseen or anticipated by it. That it ought to have been foreseen and provided against is shown by the case of *Koons v. Railroad Co.*, 65 Mo. 592. Not having been provided against, the original negligence continued and remained a culpable and direct cause of the injury, and the test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise. *Lane v. Atlantic Works*, 111 Mass. 136. Mr. Wharton on Negligence, section 85, states the doctrine thus: "As a legal proposition we may consider it established that the fact that the plaintiff's injury is preceded by several independent conditions, each one of which is an essential antecedent of the injury, does not relieve the person, by whose negligence one of these antecedents has been produced, from liability for such injury."

3. ——: ——: injuries to children playing on turn-table.

The above disposition of the objections made to the petition also disposes of the objections taken to the action of the court in giving plaintiffs' first and fifth instructions, which are to the effect that if defendant used and operated said turn-table or had the charge of the same, it was liable for injuries occasioned by its neglect to keep the same so guarded or fastened that it could not be revolved. It also disposes of the objections made to the action of the court in refusing defendant's instructions to the effect that as the petition did not in terms allege that at the time of the injury the turn-table was owned or controlled by defendant, and as there was no evidence of either of these facts, the

jury would find for defendant, and also the objections taken to the action of the court in refusing defendant's fourth fifth, sixth and tenth instructions of a like character. The circuit court evidently tried the case on the theory that the averment in the petition that defendant used and operated the turn-table was equivalent to alleging that it had charge and control of the same, and accordingly, as we think properly, instructed the jury in the first and fifth of plaintiffs' instructions, and properly refused instructions numbered three, four, five, six and ten asked by defendant negativing plaintiffs' right to recover on the ground that the petition did not in terms aver that the turn-table was either owned or controlled by defendant.

Defendant's instruction in the nature of a demurrer to the evidence was rightfully refused. There was evidence tending to show that the turn-table was erected by the Pacific Railroad Company in 1870, the land upon which it was situated having been conveyed to it by H. C. Ewing, as agent for the City of Jefferson and other parties, with certain conditions annexed, in the event of a non-compliance with which the title was to revert to the city; that it used said turn-table, which was connected with a round-house and also with the main track of the road, till 1876, when all the right and title of said company passed to and vested in defendant; that from that time and up to and after the injury to plaintiffs' son defendant continued to use and operate said turn-table and the side-track or switch leading to it from the main track, when occasion required it; that although defendant had broken the conditions in the deed conveying title, no actual forfeiture or re-entry by the city took place till in August, 1878, when defendant made a quit-claim deed to the city and restored possession. The evidence tended further to show that the turn-table was exclusively in the charge and under the control of defendant by its exclusive use and operation of it. It also tended further to show that the structure was erected on open ground in a well settled portion of the city, and near

a place where the children habitually congregated as a play-ground, and where a large portion of the population went to attend circus exhibitions; that it was a dangerous structure when left exposed and unfastened, and was liable to injure children who might be enticed upon it; that children were in the habit of playing upon it, and had been previously injured by it—of all which defendant had knowledge.

Defendant also offered the following instructions:

7. The court instructs the jury that the undisputed evidence in this case shows that the plaintiffs' said deceased son was of an age too young and tender to be, himself, chargeable with contributory negligence, and that on the day he was injured by the turn-table in question, Mrs. Emma Nagel, his mother and one of the plaintiffs in this suit, in the absence of her husband, the other plaintiff herein and the father of said boy, placed their said little son in charge and under the protection of their daughter, an elder sister of their said son, to go to a place in Jefferson City near where he was injured as aforesaid, and that his said sister to whose care and protection he had been entrusted by his mother as aforesaid, left him, her said little brother, at or near the said place and went home, soon after which he was injured upon the turn-table in question; and that such conduct on the part of his said sister, to whose care and protection he had been entrusted as aforesaid, was, in law, the act of the plaintiffs themselves, and constituted such carelessness and negligence on their part as to prevent a recovery by them in this case, and the jury are instructed that they must find for defendant.

4. NEGLIGENCE: when a question for the jury.

8. The court instructs the jury that the undisputed evidence in this case shows that the mother of Albert Nagel, the plaintiffs' said deceased son, who is one of the plaintiffs in this suit, in the absence of her husband, who is the other plaintiff and the father of said Albert Nagel, and on the day on which he was injured on the turn-table,

placed their said son in charge and under the protection of their daughter, an elder sister of their said son, to go to a place near where he was injured, in Jefferson City, and that his said sister to whose care and protection his said mother had entrusted him, left him, her said brother, at or near the said place and went home, soon after which he was injured upon the turn-table in question; and that such conduct on the part of his said sister, to whose care and protection his mother had entrusted him, was, in law, the act of the mother herself, and constituted such carelessness and negligence on their part as to prevent a recovery by the plaintiffs in this case, and the jury must find for defendant.

These instructions were refused, and an instruction given on the part of plaintiffs to the effect that unless the jury believed that Mrs. Nagel, in permitting her child Albert to go to the circus, omitted such reasonable care as persons of ordinary prudence exercise and deem adequate in the case of their children under like circumstances, or that Alice, the daughter of plaintiffs, in leaving her brother Albert at the circus, omitted such reasonable care as would be ordinarily exercised under like circumstances by children of the same age, capacity and judgment as said Alice, then the jury should find that the defense of contributory negligence on the part of plaintiffs had not been made out.

It appears from the evidence that on the day the child was injured a circus company had advertised a performance on the open ground near the said turn-table, and that before the performance began a woman would walk a wire or rope stretched outside the tent; that Mrs. Nagel, the mother of the child, without knowing, as she testified, that there was such a thing as a turn-table near the ground where the exhibition was to take place, consented that her son Albert, about six years of age, might go to the ground in company with his sister Alice, about eleven years old, that they went together in company with other children and that Alice, after remaining some time to see the woman

walk the rope, concluded to return home before the performance came off, leaving her brother (who did not wish to return without seeing it) at a lemonade and refreshment stand, first exacting from him a promise that he would stay at that place till the performance was over and then return home. She also testified that she did not know of the existence of the turn-table or its character.

Under this evidence we think the court properly referred the question of contributory negligence to the jury, the rule being that, whether a person injured by the negligence of another, was exercising ordinary care, is a question to be determined by the jury, either where the facts are disputed, or where there is a dispute or reasonable doubt as to the inferences to be drawn from undisputed facts. Wharton on Neg., § 425. The correctness of the above rule has been repeatedly recognized by this court. *Wyatt v. Railroad Co.*, 55 Mo. 485; *Norton v. Ittner*, 56 Mo. 352; 61 Mo. 592; *Mauerman v. Siemerts*, 71 Mo. 105. From the undisputed facts stated in defendants' refused instruction in connection with other facts not stated, but in evidence, that neither Mrs. Nagel nor her daughter Alice had knowledge of the existence of the turn-table or its dangerous character, a different inference from that announced in the refused instructions might well be drawn.

The court also gave, over defendant's objection, the following instruction for plaintiffs:

The jury are instructed that if you find for plaintiffs, you may, in your verdict, give them such damages, not exceeding $5,000, as you may deem fair and just, with reference to the necessary injury resulting to plaintiffs from the death of their son, and also having regard to the mitigating and aggravating circumstances attending the neglect complained of.

This instruction is objected to on the ground that no evidence was offered by plaintiffs as to the amount of damages sustained by them, and on the further ground that it omitted to tell the jury

5. ACTION FOR PERSONAL INJURIES: verdict.

what were mitigating or aggravating circumstances. The instruction as given is based upon section 2123, Revised Statutes, which provides that in such an action as this the jury may give such damages, not exceeding $5,000, as they may deem fair and just with reference to the necessary injury resulting from such death, having regard to the mitigating or aggravating circumstances attending the wrongful act, negligence or default. In the case of *Ihl v. Railroad Co.*, 47 N. Y. 317, where the plaintiff, under a statute like ours, recovered $1,800 for damages resulting from the death of his child three years old, the point made before us was considered, and the court held that the absence of proof of special damage to the next of kin resulting from the death of the child would not have justified the court in non-suiting the plaintiff or in directing the jury to find nominal damages. It was within the province of the jury, who had before them the parents, their position in life, the occupation of the father, and the age and sex of the child, to form an estimate of the damages with reference to the pecuniary injury present or prospective resulting to the next of kin. So in the case of the *City of Chicago v. Major*, 18 Ill. 349, which was an action founded on a statute like ours, it was held "that the jury must make their estimate of damages from the facts proved, and that it was not necessary that any witness should have expressed an opinion of the amount of such pecuniary loss; that it was proper for the jury to exercise their own judgment upon the facts in proof, by connecting them with their own knowledge and experience, which they are supposed to possess in common with the generality of mankind."

It will be observed that the instruction given is a literal copy of section 2123, *supra*, and such an instruction was expressly approved by this court in the case of *Owen v. Brockschmidt*, 54 Mo. 289.

In view of what is said in the case of *Rains v. St. L., I. M. & S. R'y Co.*, 71 Mo. 165, the instruction should prob-

6. ——: mitigating and aggravating circumstances

ably have gone further and designated what facts and circumstances were to be considered either in mitigation or aggravation of damages. If defendant was charged with the duty of keeping the turntable fastened or guarded, and it was negligent in not performing it, there is not a single mitigating fact or circumstance to be found in the evidence, and the failure of the court so to declare, as well as its failure to point out in detail the aggravating facts and circumstances, were errors in favor of defendant, of which it cannot complain.

We perceive no error in the action of the court in giving an instruction to the effect that if the jury believed

7. ——.

that the injury received by the boy Albert was the immediate cause of his death, that the fact that he was unskillfully treated and that such treatment contributed to his death, constituted no defense. Judgment affirmed, in which all concur.

Motion for rehearing overruled.

THE STATE v. HUDDLESTON, *Appellant.*

Practice, Criminal: PROSECUTION OF MISDEMEANORS. A conviction for a misdemeanor upon an affidavit filed by a private person alone, and without an information of the prosecuting attorney, is illegal and void. Sess. Acts 1877, p. 355, § 6.

Error to Oregon Circuit Court.—HON. J. R. WOODSIDE, Judge.

REVERSED.

L. B. Woodside for plaintiff in error.

D. H. McIntyre, Attorney General, for the State.

HOUGH, J.—At the May term, 1878, of the Oregon

circuit court, the defendant was tried and convicted upon an affidavit, made by a private person, charging him with unlawfully and willfully disturbing the peace of a school. No information was filed by the prosecuting attorney, based upon said affidavit, as provided by the law then in force, (Acts 1877, p. 355, § 6,) and the conviction was, therefore, illegal and void. The judgment will be reversed. The other judges concur.

CASE v. THE ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, *Appellant.*

1. **Railroads**: EXTENT OF DUTY TO MAINTAIN FENCES. If a railroad company has once erected a good and substantial fence along its road, as required by law, its only remaining duty is to use proper diligence in keeping the fence in suitable repair. If in spite of such diligence, animals come upon the track through breaks in the fence caused by others, and are injured, the company will not be liable.
2. ———: KILLING ANIMALS: MEASURE OF DAMAGES. If the owner of an animal killed upon a railroad track uses or gives away the carcass, the company will be entitled to have the value of the carcass deducted in estimating the damages.

Appeal from Laclede Circuit Court.—HON. R. W. FYAN, Judge.

REVERSED.

This was an action upon the statute to recover double damages for the killing of certain hogs belonging to plaintiff. There was evidence tending to show that at the place where the hogs came upon the track defendant had erected and diligently tried to maintain a fence such as the law requires, but in spite of all the watchfulness its servants could exercise planks were often torn off and carried away by persons strangers to the company, and that the fence

had been examined and found secure shortly before the killing of plaintiff's hogs; and that the hogs came upon the track through a hole made by a plank being torn off. Defendant asked an instruction to the effect that if the jury believed these to be the facts, their verdict should be for the defendant; but the court refused to give it. Other facts appear in the opinion. There was a verdict and judgment for double the value of the hogs, and defendant appealed.

John O'Day for appellant.

Where fences have once been erected as required by law, the company is only liable for a negligent failure to maintain such fences, and it is, therefore, entitled to a reasonable time in which to make repairs after having knowledge of a defect therein, or after that period has elapsed in which by the exercise of reasonable diligence it could have knowledge of such defect. *Clardy v. R'y Co.*, 73 Mo. 576; Shear. & Redf. on Negligence, § 459; *I. & St. L. R. R. Co. v. Hall*, 88 Ill. 368. A railroad company is required to use only ordinary care to keep fences in repair after they have once been substantially built. *Lemmon v. Railroad Co.*, 32 Iowa 151. The statute does not make the company absolutely liable for injuries resulting from a casual defect in the fencing. In such cases its liability is a question of neglect of duty. *Murray v. Railroad Co.*, 4 Keyes 274; *Wheeler v. Railroad Co.*, N. Y. S. C. (Thomp. & Cook) 274; *Railroad Co. v. Enoch*, 42 Miss. 603. If the fence was torn down by the act of strangers, the company would not be liable until after the lapse of sufficient time for the company in the exercise of reasonable diligence to discover and repair the injury to fence. Companies are not bound to do impossible things, nor to keep a constant patrol day and night. *Ill. Cent. R. R. Co. v. Swearingen*, 47 Ill. 206; *s. c.*, 33 Ill. 289; *C. & N. W. R. R. Co. v. Barrie*, 55 Ill. 226; *I. & St. L. R. R. Co. v. Hall*, 88

Ill. 457. If the fence is repaired within a reasonable time, the company is not responsible under the statute for cattle entering through the breach. *Ill., etc., R. Co. v. Dickerson*, 27 Ill. 55; *Toledo, etc., R. Co. v. Daniels*, 21 Ind. 256; *Indianapolis R. Co. v. Truitt*, 24 Ind. 162; *Toledo, etc., R. R. Co. v. Fowler*, 22 Ind. 316; *Murray v. Railroad Co.*, 4 Keyes 274.

Dixon & Wallace for respondent.

I.

SHERWOOD, C. J.—There was obvious error in refusing to submit to the jury the question whether due diligence had been used by defendant's agents to discover defects in the fence along its line of road. After a good and substantial fence has been built by a railroad company, as in the case at bar, its sole remaining duty is to use proper diligence in keeping the fence in suitable repair; and that defendant's agents had performed this duty is established by witnesses introduced on its behalf, and this was sufficient to base an instruction upon. *Clardy v. Railroad Co.*, 73 Mo. 576. Any other doctrine than this, in regard to the duty of the company, would make it the insurer of fences which it is required to build and maintain.

II.

There was error also in instructing the jury to assess the damages of plaintiff at double the value of the hogs killed, and for this reason: The testimony of plaintiff's own witness, shows that plaintiff used one of the hogs himself and gave the other to witness, and that the hogs when dead were worth $10 apiece. The benefit thus received from the hogs when killed, should have been allowed to reduce the damages claimed, in a manner proportionate to such benefit. *Jackson v. Railroad Co.*, 74 Mo. 526. Therefore, judgment reversed and cause remanded. All concur.

BAKER v. THE CITY OF ST. LOUIS, *Appellant.*

1. **Covenant**: SPECIFIC PERFORMANCE. The representatives of the covenantee may proceed in equity to compel specific performance, where the covenant is one which runs with the land.
2. ——, RUNNING WITH THE LAND. A covenant in a conveyance of realty to a city for a street and market house, that the lot shall revert and the grantee re-convey when the ground ceases to be used for a market, runs with the land, the grantors retain the fee subject to the easement, and abandonment gives a right of re-entry.
3. ——, TO RE-CONVEY IN CASE OF BREACH. The covenant to re-convey relieves the grantors from the rule which requires that the reversioner shall enter before he can maintain a claim of forfeiture for a breach of a condition subsequent.
4. **Streets**: PARTITION OF ABUTTING LANDS: RIGHTS OF PARTITIONERS IN STREET. Where the grantors have made partition of the ground bounded on one side by the dedicated street, the deeds carry the fee, subject to the easement, to the center of the street, and each grantee takes in severalty a reversionary right in so much of the street as pertains to the lot acquired by him in partition, which he may assert against the city.
5. **Equity** JUDGMENT FOR POSSESSION. Judgment for possession may follow the final ascertainment of a party's title as against his adversary in possession in a proceeding in equity.*

Appeal from St. Louis Court of Appeals

AFFIRMED.

Leverett Bell for appellant.

Garland Pollard for respondents.

RAY, J.—This case involves a number of points, all of which are elaborately discussed and decided by the St. Louis court of appeals in its opinion in this case, reported in 7 Mo. App. 429. We have carefully considered that opinion together with the record in the cause, as well as the briefs and arguments of counsel in this court, and as we concur with that court, not only in the result reached,

*These syllabi are taken from 7 Mo. App. 429.

but also in the treatment and disposition of the several points involved in the case we deem it sufficient to refer to that opinion as containing the law of the case, well considered and correctly decided. The judgment of the St. Louis court of appeals is, therefore, affirmed. All the judges concur.

GROVE v. THE CITY OF KANSAS, *Appellant.*

1. **Pleading**: PRACTICE: JEOFAILS. If a material matter is not expressly averred in the pleadings, but is necessarily implied from what is stated therein, the defect is cured by verdict in favor of the party so pleading. If the defendant in such a case pleads to the merits, he thereby waives the objection to mere formal defects, and will not be heard on the trial to object that the petition does not state a cause of action. Such objection can only be interposed when the petition altogether fails to state any cause of action, not where one is defectively stated.
2. **Practice in Supreme Court**: WEIGHT OF EVIDENCE. When there is any evidence to support the verdict of the jury, or when the evidence is conflicting, the settled rule of this court is not to reverse a case upon the mere weight of evidence.
3. **Practice**: INSTRUCTIONS. Under the circumstances of the present case, the objection that the jury did not take the instructions with them to their room, came too late when made for the first time by motion for new trial.

Appeal from Jackson Special Law and Equity Court.—HON. R. E. COWAN, Judge.

AFFIRMED.

Henry N. Ess for appellant.

Tichenor & Warner for respondent.

RAY, J.—The petition in this case was as follows, to-wit: Plaintiff states that defendant is and was, at the dates

hereinafter mentioned, a municipal corporation, duly incorporated under the laws of the State of Missouri; that on the 3rd day of February, 1877, while plaintiff was carefully passing on and along the sidewalk on the east side of Main street, between Tenth and Eleventh streets, in defendant's corporate limits, she was thrown upon said sidewalk and into a cellar underneath the same, by reason of the dangerous, unsafe and insecure condition of the trapdoor in said sidewalk; that plaintiff then and there received great and permanent bodily injuries, her wrist being then and there broken and mutilated, and she received other great injuries, and was made sick, sore and lamed and disabled, and she still remains disabled, and has suffered great pain by reason of said injuries; that defendant, well knowing the unsafe, dangerous and insecure condition of said sidewalk, as aforesaid, disregarding its duty, carelessly and negligently suffered and permitted the same to remain in such unsafe, dangerous and insecure condition, well knowing that said sidewalk was a part of said Main street, the same being one of the principal thoroughfares in said city; wherefore, plaintiff says she is damaged in the sum of $5,000, for which sum she asks judgment.

The answer was, 1st, A general denial; 2nd, Contributory negligence by plaintiff. The reply put in issue the new matter set up in the answer.

At the trial, the defendant objected to the introduction of any evidence for the plaintiff, for the reason that the petition did not state facts sufficient to constitute a cause of action, in this, that it is not alleged that the city ever accepted the original dedication of the street at this point, or that it had ever assumed control over the same, in any way whatever. The objection was overruled and duly excepted to, and thereupon plaintiff offered evidence on her part tending to support the petition. The defendant, also, offered evidence on its part tending to disprove it, except, that on the trial it expressly admitted that the sidewalk was constructed in pursuance of an ordinance of

the city council, and that Main street, of which said sidewalk formed a part, was a street of the defendant. There was no objection to the instructions given for the plaintiff; and all the instructions asked by the defendant were given, except the first, which was in the nature of a demurrer to the evidence, and is as follows: "The court instructs the jury that there is no evidence of negligence on the part of the defendant, and that the plaintiff cannot recover." This instruction was refused, and duly excepted to by the defendant. The jury returned a verdict for the plaintiff for $2,700 damages. In due time the defendant filed its motion for a new trial, for the reasons generally stated: That the petition was insufficient, and that no testimony ought to have been admitted; that there was no evidence of negligence; that the first instruction of the defendant ought to have been given; that the verdict was against the law and evidence; that the damages were excessive; and that the jury retired to their room and made and reached a verdict without having with them, for their guidance, the instructions. Pending the motion for a new trial, the plaintiff remitted $700 from the verdict, and thereupon the court overruled the motion and rendered judgment for $2,000, being the amount of the verdict, less the $700 remitted by the plaintiff—to which action of the court the defendant duly excepted and brings the case here by appeal.

The grounds relied on for a reversal of the judgment in this cause, are, 1st, That the petition does not state a cause of action; 2nd, That the first instruction asked by the defendant should have been given; 3rd, That the damages are excessive; and 4th, That the instructions, as given, should have been carried by the jury to their room for a guidance to a correct verdict, according to the law and evidence.

On the first point, the case of *Bowie v. Kansas City*, 51 Mo. 454, (see pages 459, 460, 461 and 462,) and the case of

1. PLEADING: practice: jeofails.

Elfrank v. Seiler, 54 Mo. 134, and the principles and authorities there contained and cited are decisive of this case, and settle the question adversely to the claim of the defendant. The doctrine of these cases, taken together, is, first, that "If a material matter be not expressly averred in the pleadings but is necessarily implied from what is expressly stated therein, the defect is cured by verdict in favor of the party so pleading, on the presumption that he has proved upon the trial the facts insufficiently averred;" and secondly, that if the defendant, in such cases, pleads to the merits, he thereby waives the objection to mere formal defects, and will not be heard, on the trial, to object that the petition does not state a cause of action. Such an objection can only be interposed, at the trial, where the petition fails altogether to state any cause of action, and not to the case where a cause of action is defectively stated. Such an objection at the trial is only allowable where the petition is radically and not formally defective. Where the defect is such that it would be cured by verdict, it cannot be taken advantage of in this way, but must be taken by demurrer or answer in the regular way. If, however, the objection is such that a motion in arrest would reach it, then it can be reached, on an objection to the introduction of any evidence at the trial, otherwise not. Tested by the principles and authorities stated and cited in the foregoing cases, when taken together, the petition in this case is manifestly good after verdict, and the defects therein, if any, being formal, rather than vital, cannot be reached at the trial on an objection to the introduction of any evidence on the part of the plaintiff, as was attempted in this case. Such an objection, if not taken by demurrer or answer in the regular way, is waived by pleading to the merits. § 3519, R. S. 1879. In this case, also, the proof of the only facts insufficiently alleged, according to defendant's objection, is not left to presumption as in the case of *Bowie v. Kansas*

City; but, as we have seen, is expressly admitted by the defendant on the trial.

There was no error in the refusal of the first instruction for the defendant. When there is any evidence to support the verdict of the jury, or where the evidence is conflicting, the settled rule of this court is not to reverse a case upon the mere weight of evidence. In looking at the testimony in this cause it appears that the trap-door in the sidewalk in question, led to the cellar under the clothing house of J. A. Poll & Co., situated on east side of Main street, between Tenth and Eleventh streets, in a populous part of the city; that said trap or cellar door was a double door closing in the middle and running crossways the sidewalk; that the doors, when shut down, in their place, were even with and constituted a part of the sidewalk; that when closed, they rested on strips or cleats fastened to the sills or frames below, and that these strips formed their main support; that each door or shutter was also further secured and adjusted to their proper places by hinges on each; that these hinges were frequently broken and out of repair, and when broken, the doors would not of themselves, when being closed, fit down in their proper places, so as to rest on the strips below, their main support, but would swing around out of place, and had to be shoved into their place, and stamped down by those engaged in opening and shutting them; that this trap-door, in the sidewalk, was of frequent use by those going in and coming out of the cellar; that this part of the street and sidewalk was in one of the most populous parts of the city; and that streams of persons going both ways were almost constantly passing on and over the same; that the broken condition of the hinges to the trap-door gave much bother and inconvenience to those having occasion to open and shut them by reason of getting out of place and having to be shoved and stamped in order to force them into position and upon their proper support below; that this process of being

2. PRACTICE IN SUPREME COURT: weight of evidence.

forced into position, was of frequent occurrence and consumed some time, during all which, passers were going and coming over them; that at the time of this accident, and for some considerable time before, the hinges were broken and had been observed by all those having occasion to use them, by the policeman on that beat of the city, and were open and exposed to the view of all passers-by; that the city engineer, whose duty it was to look after defects and obstructions in the sidewalks and streets, was in the frequent habit of passing that way and of calling at the door and sidewalk, in front of said clothing house, where the trap-door was situated, and might have observed the same, and the condition of its hinges, if he had noticed and been on the lookout, as was his duty as such engineer. And it further appears that at the instant of this accident, Mr. Horn, the clerk of the clothing house, who had had occasion to go in and out of the cellar, was in the act of closing this trap-door, or rather was shoving it into its place and stamping upon it to force it into position, by reason of its broken hinges, when the plaintiff was passing and attempted to go over it. It also appears that this stamping upon the door to force it into position, rendered necessary by the broken hinges in question, caused the strip below on which it rested to give way and thus precipitate the plaintiff into the cellar and occasion the injuries complained of. Under all these circumstances we cannot say that there was no evidence of negligence on the part of defendant and its authorities in the premises. This was a question for the jury, under the instructions of the court, which were not objected to, and they having found against the defendant, it is not our province in such case to interfere with their finding.

The objection that the jury did not take the instructions with them, to their room, when they retired to consider of their verdict, under the circumstances of the case, is not well taken. It does not appear that the jury called for them or that the

3. PRACTICE: Instructions.

court refused to allow them to take them, or that the counsel on either side asked or requested that the jury might take them. It does appear that said instructions were read to the jury at the trial and commented on by both parties, and that the jury returned without them, without any objection by the defendant or its counsel. Under such circumstances, it is too late for the defendant to raise this objection for the first time in its motion for a new trial.

The objection that the verdict is excessive, is, we think, without merit, especially after the remitter in question.

As no error appears in the record, the judgment of the special law and equity court of Jackson county, at Independence, is affirmed. All the judges concur.

PICKLAR v. HARLAN, *Appellant*

Promissory Note: LIABILITY UPON INDORSEMENT MADE AFTER DEATH OF MAKER. The indorser of a negotiable promissory note, who becomes such after the maturity of the note, and after the death of the maker, and with knowledge of the death, will be held to his liability as indorser, without demand, protest or notice, if the holder in due time procures the allowance of the note by the probate court against the estate of the maker.

Appeal from Adair Circuit Court.—HON. ANDREW ELLISON, Judge.

AFFIRMED.

This was a suit against Harlan as indorser of a negotiable promissory note. The note was made in April, 1871, by Wm. T. Porter, payable one day after date to the order of Harlan. Porter died in June, 1871. In August, 1871, plaintiff received the note from defendant in part payment for a stock of goods, defendant indorsing it with knowl

edge of Porter's death. Plaintiff immediately presented it to Porter's administrator, who did not pay, but waived legal notice, and at the first term of the probate court thereafter plaintiff presented it to the court and obtained an allowance. The estate proving insolvent a part only of the note was paid by the administrator. Plaintiff did not give defendant immediate notice of the failure of the administrator to pay upon presentation.

James Ellison for appellant.

Harrington & Greenwood for respondent.

NORTON, J.—The question decisive of this case, upon which, by defendant's appeal, we are called upon to pass, is: Can an indorser of a negotiable note, who indorses the same after maturity, and after the death of the maker, with full knowledge of his death, be held responsible to the holder, without demand, protest and notice, the holder having in due time presented the note for allowance against the estate of the maker, which was allowed but not paid because of the insolvency of the estate? An affirmative answer to this question affirms, and a negative answer reverses the judgment. The question has been answered in the affirmative by this court in the case of *Davis v. Francisco*, 11 Mo. 572, where it was held that the indorser of a negotiable note is not liable by reason of the insolvency of the maker, but to hold an indorser liable there must be a demand and notice of non-payment, but that in a case where the maker was dead at the time of indorsement, which fact was known to the indorser, no demand can or need be made other than due presentment of the note for allowance against the maker's estate. We think this case falls within that class of cases where demand and notice are excused "from the entire absence of necessity or utility, because the party who should receive the notice must know the facts as well as the party who should give the notice.

If, for example, A draws on himself payable to himself, and then accepts, and then indorses, a holder need not first demand of him as drawer and then notify him again as indorser. * * This principle is not applied when a person can be proved to have had knowledge of the fact, for it is certain that this is no excuse for want of notice, but when the person must of necessity have knowledge by presumption of law, as when a firm draws upon itself, or a member of the firm draws upon the firm." Parsons on Notes and Bills, 521. The indorser in the case before us knew at the time of the indorsement that the maker was dead, and is presumed to have known that the administrator of his estate could not be required to pay before the end of one year after grant of letters and notice, such being the law of this State as enunciated by this court in the case of *Dullard v. Hardy*, 47 Mo. 403.

We have not been able to find any case where it has been held that when the indorsement was made after the maturity of the note and the death of the maker, which fact was known to the indorser at the time, and where the administrator was not required by law to pay demands of that character before the end of one year, that demand and notice has been required as prerequisites to the liability of the indorser. An indorsement of a negotiable note after maturity is equivalent to drawing a new bill at sight, but this rule can have no application when the maker of the note at the time of such indorsement was dead, which was known to the indorser, for the reason that in every bill there must be a drawer and drawee, as in every deed there must be a grantor and grantee. Such cases as the one in hand are anomalous, and while the obligation of an indorser is that he will pay after due demand, protest and notice thereof, in such a case as the above, where the indorser is presumed to know as a matter of law that the administrator is not required to pay till the expiration of one year after grant of letters, and that a demand would, therefore, be fruitless, we can perceive no reason, as was

said in the case of *Davis v. Francisco, supra*, for notifying him of a fact he is presumed to know. Judgment affirmed, in which all concur.

WILLIAMS, *Plaintiff in Error*, v. JENSEN.

1. **Married Woman Signing a Note, Without Separate Estate:** BURDEN OF PROOF. The signature of a married woman to a note already issued, adds nothing to the note, does not change the legal liability of the parties already bound, and, therefore, does not constitute an alteration, of which one of them may take advantage when the signature has been obtained without his consent—unless the married woman has a separate estate; and the burden of proving that she has such separate estate rests upon the person asserting that the signature constitutes an alteration.
2. **Consideration, what is a Sufficient:** SURETY: RELEASE BY EXTENSION OF TIME. A consideration may be good in law though it be of no value to the party to whom it moves. If it be a damage or inconvenience to the other party, that will be sufficient. Thus, where the holder of a promissory note agreed with the maker to extend the time of payment provided he would get A. (a married woman) to sign the note; *Held*, that the procurement of A.'s signature (though for want of a separate estate it was of no legal effect), was a sufficient consideration for the extension, and that a surety, without whose consent the signature had been obtained, was thereby discharged.

Error to Pike Circuit Court.—HON. G. PORTER, Judge.

AFFIRMED.

E. T. Smith for plaintiff in error.

1. The signing of the note by Mrs. Stonebreaker, she being a married woman without any separate estate, was an absolute nullity, and did not constitute a valid consideration for the agreement not to sue. Daniel Neg. Inst., (2 Ed.) 206; *Mason v Morgan*, 2 Ad. & El. 30; *Howe v.*

Wilder, 34 Me. 566; *Vansteenbergh v. Hoffman*, 15 Barb. 28; *Bauer v. Bauer*, 40 Mo. 61. Therefore, the contract was not binding on the plaintiff and he could have sued at any time, and hence the surety was not discharged.

2. The note was not so altered by the signature of Mrs. Stonebreaker as to discharge the surety. Her signature was an absolute nullity, and the legal effect of the note was just the same before as after her name was affixed to it. The liability of Jensen was in no way altered by her signing. *Catton v. Simpson*, 8 Ad. & El. 136; 2 Parsons Bills, 549.

W. H. Biggs for defendant in error.

1. Any change of a written instrument which varies its original legal effect either in respect to the obligation or to the force and effect of the instrument itself as a matter of evidence is a material alteration, and will discharge all parties not consenting to the change. *Haskell v. Champion*, 30 Mo. 136; *Medlin v. Platte Co.*, 8 Mo. 238; *Moore v. Hutchinson*, 69 Mo. 429; *Evans v. Foreman*, 60 Mo. 449; *Capital Bank v. Armstrong*, 62 Mo. 59; *German Bank v. Dunn*, 62 Mo. 79. It was sufficient for Jensen to show that the name of Mrs. Stonebreaker was added to the note without his knowledge or consent. *Prima facie* this would operate as a material alteration, and if the fact that she had no separate property would render the change an immaterial one, then it devolved on plaintiff to show this. 2 Daniel Negt. Inst., § 1389. But it makes no difference whether defendant's original obligation was changed by adding the name of Mrs. Stonebreaker or not, or whether plaintiff was in any way benefited by the change. If the identity of the instrument was destroyed, or its force and effect as a matter of evidence in any way varied, this makes the change a material one.

2. The proposition to Stonebreaker was that he should procure his wife's signature, and in consideration of that

he was to have the extension. He procured the signature, and that constitutes a sufficient consideration for the promise for extension. The consideration is sufficient if he was put to any trouble or detriment in obtaining his wife's signature; any consideration, however small, will sustain the contract. If the contract had been that Stonebreaker should furnish good additional security, then probably the plaintiff would be right.

HOUGH, J.—On the 8th day of June, 1878, John E. Stonebreaker and the defendant, H. F. Jensen, executed a note to the plaintiff, A. W. Williams, for $475, due three months after date, on which this suit is founded. About the time of the maturity of the note, Williams agreed with Stonebreaker that if he would get his wife, Alicia M. Stonebreaker, to sign the note, he would extend the time of payment to August 1st, 1879. Williams knew that Jensen, who signed the note as joint maker, was surety only, and it is conceded that Jensen did not know at the time, that Mrs. Stonebreaker had signed the note, or that Williams had agreed to extend the time of payment, and he never consented thereto. There is no testimony tending to show that at the time she signed the note Mrs. Stonebreaker had any separate estate.

Jensen now contends that he is released from all liability on said note, for two reasons; 1st, Because the addition of the name of Mrs. Stonebreaker as a joint maker of said note is such an alteration as discharged him; and 2nd, Because the time of payment was extended by the plaintiff in pursuance of a valid contract therefor, without his consent.

1. MARRIED WOMAN SIGNING A NOTE, WITHOUT SEPARATE ESTATE: burden of proof

As the signature of Mrs. Stonebreaker imposed upon her no legal liability whatever, being in contemplation of law a nullity, the responsibility of the parties to the note was in no way increased or diminished or otherwise changed by the addition of her name thereto. Precisely the same legal

liability attaches to all the parties, since Mrs. Stonebreaker signed the note, which previously attached to them, and the same rights and remedies, and none other, exist, which previously existed. If all the original parties to the note had consented to the addition of her name, it would not in the slightest degree have altered their relations to the note, or to each other. As the consent of the parties could add nothing to the validity of her signature, neither can the absence of consent constitute her signature an alteration of the note. When written, it was in the eye of the law, and still is, nothing—and the defendant remains liable just as he was before it was appended. It is unnecessary to cite authorities in a case like this. The general rule is well understood; we have found no case in all respects like the present, and no light is to be drawn from analogous cases. We pronounce Mrs. Stonebreaker's signature to be no alteration. An alteration *ex vi termini* imports a change in some particular. Her signature changed nothing. *Vide Cushing v. Field*, 10 Reporter 334. If she had capacity to contract by reason of having a separate estate, the burden was on the defendant to show it.

2. CONSIDERATION, WHAT IS A SUFFICIENT: surety release by extension of time.

As to the second point. The bill of exceptions contains the following statement: "Mrs. Stonebreaker, who signed the note, was my wife, and she signed the note in consideration of Mr. Williams giving me additional time to pay it. He agreed if I would get my wife to sign the note he would extend the time to August 1st, 1879." Williams doubtless intended and expected not only to obtain the signature of Mrs. Stonebreaker but to obtain also some obligation on her part. Yet he must be presumed to know the law, and to know, therefore, that her signature could create no legal obligation. Mrs. Stonebreaker appears before us only as a married woman without any separate estate, and, therefore, powerless to contract. Whether Mrs. Stonebreaker was seized of property not her separate estate, which the defendant supposed she might feel some moral obligation to

apply to the payment of the note which he desired her to sign, is not disclosed by the record. Whatever may have been his motive, he agreed to extend the time of payment upon the condition that her husband would obtain her signature to the note; and the obtainment of her signature, though such signature be of no value to Williams, constitutes a sufficient consideration for his agreement to extend the time of payment. It is not always necessary that the consideration for a promise should be of some value to the promisor. Damage or inconvenience to the promisee is a sufficient consideration, and where the court can see that there may have been such inconvenience, it will uphold the contract. It may have been an inconvenience for Stonebreaker to secure the signature of his wife, and this much appearing, the law will shut its eyes to the inequality between the consideration and the promise. In the case of *Lindell v. Rokes*, 60 Mo. 250, Rokes promised to pay Lindell $50 if the latter would abstain from the use of intoxicating liquors and beer for a stated length of time, and the promise was held to be valid and binding. In *Haigh v. Brooks*, 10 Ad. & El. 309, it was held that a piece of paper upon which a void contract was written was a sufficient consideration for a guaranty of £10,000; and in *Sturlyn v. Albany*, Cro. Eliz. 67, the showing of a deed was held to be a sufficient consideration for a promise to pay rent. In *Brooks v. Ball*, 18 Johns. 337, a promise to pay a certain demand if the claimant would swear to its correctness, was enforced. Any trouble or labor however slight, undertaken by one person at the request of another, will support a promise by such other person, although the trouble or labor be of no benefit to the promisor. Addison on Contracts, (Morgan's Ed.) § 9; *Clark v. Sigourney*, 17 Conn. 511. Being of opinion that the agreement to extend the time of payment was supported by a sufficient consideration, the judgment, which was for the defendant, will be affirmed. The other judges concur.

PHILLIPS v. GOLDMAN, *Appellant.*

Sheriff's Power to Re-sell. To authorize a sheriff to re-sell land struck off at execution sale, it is essential that the purchaser shall have refused to pay the amount of his bid. Simple neglect to pay is not always tantamount to refusal. Unless he either positively refuses, or does some act which amounts to a repudiation of his obligation to pay, the sheriff, before making a re-sale, should not only demand the purchase money, but also tender a deed. R. S. 1879, § 2384.

Appeal from Linn Court of Common Pleas.—HON. THOMAS WHITAKER, Judge.

REVERSED.

Chas. A. Winslow for appellant.

S. P. Huston for respondent.

HOUGH, J.—This is a proceeding by motion, instituted by the sheriff of Linn county, under section 2384 of the Revised Statutes, to recover from the defendant the difference between the amount bid by him for certain real property at a sale under execution, and the amount realized by the sheriff at a re-sale of said property, alleged to have been made in pursuance of said section. Said section is as follows: "If the purchaser refuse to pay the amount bid for property struck off to him, the officer making the sale may again re-sell said property to the highest bidder, at the same term, or he may re-sell it on a subsequent day, as though no previous sale had been made, and if any loss shall be occasioned thereby, the officer shall recover the amount of such loss, with costs, by motion, before any court, or before any justice of the peace, if the same shall not exceed his jurisdiction." The defense chiefly relied upon by the defendant is, that he never refused to pay the amount bid by him, and it is the only one which we deem it necessary to notice.

The property was first sold to the defendant on the 8th day of February, 1879, for $175, and was re-sold on the 27th day of February, at the same term, to one Strawbridge for $14.

The testimony of the sheriff is as follows: Goldman never paid his bid. I went down to his store the day, or the day after, the land was sold, and met him on the street, and told him his deed was ready, and he said he would be up that evening, that he wanted to see Price. I told him all right. He did not come to see me that evening, nor at any other time till after the sale to Strawbridge. I re-sold the land February 27th, 1879, about two p. m.; went down to see Goldman before sale, and sent a man to see him, also, but learned that he was out of town. When I saw Goldman and told him his deed was ready, he said he wanted to see Mr. Price, who was Kimball's agent; suppose I told him it was all right; never saw him afterward, until I re-sold the land; never made any formal demand upon him for the amount of his bid; told him his deed was ready, and he said he would be up that evening; made no objection to my not offering him the deed: it was made out and acknowledged.

The defendant testified: That he bid in the land in good faith and intended to pay for it; that the day after the sale, he asked the sheriff to let the matter rest, until he could see Mr. Price, who was Kimball's agent, and if he would pay the amount of the execution and costs witness would let the matter go; to this the sheriff replied, that it would be all right. I did not see the sheriff again until after he had sold to Strawbridge; went out in the country about noon of that day to buy some hay, and got back about fifteen minutes after the second sale took place. I immediately tendered him the amount of my bid and demanded a deed; he said he had waited on me and I must now wait on him. I tendered him $180. He never asked me for the money, and I never refused to pay him my bid;

he never demanded the money of me, or tendered me a deed.

It is essential to a recovery under the statute cited, that the purchaser shall have refused to pay the amount of his bid. Simple neglect to pay is not always tantamount to a refusal to pay, and under the circumstances recounted in the testimony before us, we do not think the neglect of the defendant amounted to a refusal. Unless the purchaser positively refuses to pay the amount of his bid, or does some act which amounts to a repudiation of his obligation to pay, the sheriff should not only demand the purchase money, but should also tender a deed, before making a re-sale under the statute. *Conway v. Nolte*, 11 Mo. 74; *Shaw v. Potter*, 50 Mo. 281. This was not done in the case before us, nor was anything done which was equivalent to it. The sheriff distinctly states that he did not even demand the purchase money. He contented himself with stating to the defendant that the deed was ready for him. This did not amount to a tender of the deed. The testimony of the defendant is explicit that no demand was ever made by the sheriff, and no deed tendered, and that he never at any time refused to pay the amount of his bid, but on the contrary purchased in good faith and intended to pay the purchase money. On the facts in evidence, we are of opinion that the finding should have been for the defendant. Judgment reversed. All the judges concur.

GATES v. BUCK, *Appellant.*

Sheriff's Fees: LIABILITY OF ASSIGNEE OF JUDGMENT FOR THEM. Where land was levied on, sufficient in value to satisfy the execution, and afterward the judgment was assigned, and by order of the assignee the levy was released and the execution returned unsatisfied, and afterward the judgment was satisfied, but the consideration was paid direct to the assignee; *Held*, that the case fell within the last clause of section 13, page 625, Wagner's Statutes, and the assignee

was bound to pay the sheriff his half commissions, as therein allowed.

Appeal from Buchanan Circuit Court.—Hon. Jos. P. Grubb, Judge.

Affirmed.

Judson & Motter for appellant.

Beattie and Weakley, during their ownership of the judgment, invoked the aid of the sheriff in its collection by putting an execution in his hands; but this was immediately recalled as soon as the judgment became the property of Buck. By the agreed statement of facts it appears that Buck and Smith had other business transactions, and a general settlement was had between them some months afterward, which resulted in the satisfaction of this judgment. Buck used no process of the court to coerce payment. No services were required of the sheriff, and no commission or fees were earned by him. It would be a strange and curious construction of this statute to hold that a sheriff was entitled to a commission from the owner of every judgment whenever it should be entered satisfied.

Allen H. Vories for respondent, cited *Jackson v. Anderson*, 4 Wend. 479; *Gordon v. Maupin*, 10 Mo. 352; *Irwin v. Milburn*, 10 Mo. 456; *Gaty v. Vogel*, 40 Mo. 554.

Henry, J.—This suit was instituted in the Buchanan circuit court and was tried and determined upon the following agreed statement of facts:

That during 1874 and 1875, plaintiff was sheriff of Buchanan county, Missouri; that on October 5th, 1872, Armstrong Beattie and Thomas B. Weakley recovered a judgment in the circuit court of said county, for $29,418.20 against Frederick W. Smith, judgment bearing ten per cent; that on September 26th, 1874, an execution was or-

dered out by said Beattie and Weakley upon said judgment from the clerk's office of said court, and upon the same day delivered to the plaintiff herein, for collection, as sheriff of Buchanan county; that thereupon said plaintiff, as sheriff aforesaid, levied upon a large amount of the real estate, sufficient to pay the debt, belonging to said Smith, and advertised the same for sale under said execution—of all which defendant Buck had concurrent knowledge; that before said sale and before the return day of said execution, defendant Buck purchased from said Beattie and Weakley their said judgment against said Smith, and the same was duly assigned to defendant, who immediately recalled said execution, that had been ordered by said Beattie and Weakley, and said execution was thereupon returned, and no sale took place under the before mentioned levy, and there was no other; that on the 4th day of June, 1875, said Smith made a general settlement with defendant Buck, which included this judgment among other matters, and that said Buck on said day, at the request of said Smith, entered satisfaction of said assigned judgment upon the records; that during the ownership by said Buck of said judgment, nor at any other time, did he order out any execution upon said judgment, nor was any execution ever issued upon said judgment, except the one hereinbefore mentioned as having been ordered out by Beattie and Weakley; that plaintiff, as sheriff, never actually received in his hands, collected or paid over to said Buck, any money upon said judgment.

Plaintiff claims that he is entitled to half the regular commission under section 13, Wagner's Statutes, 625, which provides that sheriffs shall be allowed a commission for receiving and paying moneys on execution or other process "where * * lands or goods have been levied on, advertised and sold, three per cent on $500, and two per cent on all sums above $500, and half of these sums where the money is paid to the sheriff without a levy, or where the lands or goods levied on shall not be sold, and the

money is paid to the sheriff or person entitled thereto, his agent or attorney." The circuit court held that on the agreed facts plaintiff was entitled to recover and rendered a judgment accordingly, from which defendant has appealed.

The conditions on which the sheriff was entitled to the commission claimed had occurred, and we are all of opinion that the circuit court properly construed the statute, and drew the proper deductions from the agreed facts. The judgment is affirmed.

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ABBREVIATIONS.

Abbreviations appearing in a written instrument may be explained by parol evidence. *The First National Bank of Springfield v. Fricke*, 178.

ADMINISTRATION.

1. ADMINISTRATOR, PROPER PARTY TO EXECUTION, WHEN. Where the plaintiff in an action of unlawful detainer dies leaving a judgment for possession and damages unsatisfied as to the damages, execution properly issues in the name of the administrator, not of the heir. *Sims' Administrator v. Kelsay*, 68.

2. PROMISSORY NOTE. If one of the administrators of an estate, upon final settlement, accounts in money for the full amount of a note belonging to the estate, and the settlement is accepted and the administrators discharged, the note, by operation of law, becomes his private property. *Smith v. Gregory*, 121.

3. ——: ADMINISTRATION. The obligation of a married woman, even though she had a separate property when she contracted it, cannot after her death, be proved against her estate in the ordinary way. The circuit court alone can adjudicate such a demand. *Davis v. Smith*, 219.

4. ——: EFFECT OF HER DEATH. While the death of a married woman does not extinguish the right of a creditor to satisfaction of an obligation incurred by her while *covert*, out of what was her separate property, neither does it give him a right to satisfaction out of any other of her property. This is subject to the debts of her general creditors, if she have any, while they, equally with the special creditors, have a right to resort to whatever was her separate property for payment of their demands. *Ib.*

5. To sustain an action on an administrator's bond for non-payment of a demand allowed against the estate, it is not necessary to show an order of payment by the probate court. It is enough to show assets sufficient in the hands of the administrator and refusal to pay. *The State ex rel. Longdon v. Shelby*, 482.

6. JURISDICTION. The circuit and not the probate court has jurisdiction of actions on administrators' bonds. *Ib.*

7. ACTION ON ADMINISTRATOR'S BOND: PRACTICE. Where a party aggrieved by the acts of an administrator sues upon his bond in his own name, it is proper for the court to permit him to correct the error by substituting the State as nominal plaintiff. *Ib.*

8. ——: PROPER PARTY. Where a demand had been allowed against an estate and in favor of a trustee for several persons, and afterward two of these persons assigned their interests, *Held*, that the assignee became the real party in interest, and an action against the administrator on his bond for non-payment of the assigned demand was properly brought in the name of the State upon his relation and to his use. *Ib.*

ANNUAL SETTLEMENTS. See West v. West's Adm'r, 204.

ADVERSE POSSESSION.

POSSESSION, AS NOTICE OF CLAIM. Possession may in some cases be evidence of a claim; but when a particular claim is notorious and is sufficient to account for a possession, no one is called on to speculate as to the existence of some other claim. *Lincoln v. Thompson*, 613.

AS THE BASIS OF RECOVERY IN EJECTMENT. See Hunt v. The Missouri Pacific Railway Company, 252.

AS A DEFENSE IN EJECTMENT. See Dunn v. Miller, 260.

WHAT CONSTITUTES, NOT A QUESTION FOR THE JURY. See Boogher v. Neece, 383.

ALTERATION.

1. ALTERATION OF NOTE. Any alteration of a promissory note by a party thereto without the knowledge of the other parties, however immaterial, will invalidate it as against them.

In this case, one of the makers, who was president of the Odd Fellows' Building Association, after the note had been negotiated and without the knowledge of his co-makers, affixed to his name where it appeared as maker, the abbreviations: "Pres'd't O. F. B. Ass'n," and where it appeared as payee and indorser, in each place the abbreviation "Pres'd't." *Held*, that these were material alterations and invalidated the note as against the other makers. *The First National Bank of Springfield v. Fricke*, 178.

2. MARRIED WOMAN SIGNING A NOTE, WITHOUT SEPARATE ESTATE: BURDEN OF PROOF. The signature of a married woman to a note already issued, adds nothing to the note, does not change the legal liability of the parties already bound, and, therefore, does not constitute an alteration, of which one of them may take advantage when the signature has been obtained without his consent—unless

the married woman has a separate estate; and the burden of proving that she has such separate estate rests upon the person asserting that the signature constitutes an alteration. *Williams v. Jensen*, 681.

AMENDMENTS.

See Pleading.

Practice.

ARBITRATION.

Agreement to arbitrate, when enforceable. In a suit in which the chief matter in dispute was a boundary line, judgment was rendered in accordance with an agreement settling this line, which provided, as auxiliary thereto, for the purchase of a small strip of land and a hedge by the one party from the other, at a valuation to be made by arbitrators to be selected by the parties. One of the parties having refused to select an arbitrator, *Held*, that the court had power to cause the valuation to be made by its own officer. *Black v. Rogers*, 441.

ASSIGNMENT.

1. Assignee for benefit of creditors: his liability for rents: practice. An assignee who, in the conduct of the business of his trust, continues in possession of premises let to his assignor, does not thereby subject himself to a personal liability for the rent. To create such liability there must be a special agreement. And when the assignee is sued personally, the fact that he may have assets as assignee will not authorize recovery. *White v. Thomas*, 454.

2. Corporation: assignment for benefit of creditors. A corporation may make an assignment for the benefit of creditors under the State law. R. S. 1879, § 354. *Shockley v. Fisher*, 498.

3. ——: ——. Unpaid balances upon stock subscriptions are corporate assets and are assignable. *Ib.*

4. ——: ——. If such an unpaid balance be properly assigned, it passes to the assignee and he may collect it. *Ib.*

5. Trustee: ——. If one of two persons to whom an assignment is made for the benefit of creditors refuses to qualify, all the powers of the trust vest in the other, and he may proceed alone to collect the assets. *Ib.*

6. Sheriff's fees: liability of assignee of judgment for them. Where land was levied on, sufficient in value to satisfy the execution, and afterward the judgment was assigned, and by order of the assignee the levy was released and the execution returned unsatisfied, and afterward the judgment was satisfied, but the consideration was

paid direct to the assignee; *Held*, that the case fell within the last clause of section 13, page 625, Wagner's Statutes, and the assignee was bound to pay the sheriff his half commissions, as therein allowed. *Gates v. Buck*, 688.

INSURANCE COMPANIES CANNOT MAKE A STATUTORY ASSIGNMENT. Williams v. The Commercial Insurance Company, 388.

ATTACHMENT.

1. ORDER OF PUBLICATION. Where the affidavit for attachment contains a statement of all the facts necessary to entitle the plaintiff to an order of publication, no further affidavit is required to authorize such order. *Bray v Marshall*, 327.

2. THE TEXAS CATTLE ACT: ATTACHMENT BOND: DAMAGES. The obligors in an attachment bond given in a suit brought under the Texas Cattle Act to recover damages allowed by that act, cannot plead the invalidity of the act in avoidance of their liability on the bond. *The State ex rel. Cantwell v. Stark*, 566.

3. ——: ——: MEASURE OF DAMAGES. In an action on such a bond the recovery is not confined to the damages that may have occurred by reason of the attachment, but may include any damages directly occasioned by any process or proceeding in the suit. *Ib.*

ATTORNEYS AT LAW.

1. PARTNERSHIP. Attorneys undertaking jointly the defense of a suit at law, become, as to that case, special or limited partners. In the absence of agreement to the contrary, they will be entitled to share equally in the compensation, and it does not matter that one may do more of the work than the other. This will not entitle him to charge as for extra services. Nor will he have any remedy against the other, by dissolution of the partnership or otherwise, for failure to perform his full duty. *Henry v. Bassett*, 89.

2. JOINT CONTRACT FOR SERVICES: ABANDONMENT. If attorneys, by joint contract, undertake the defense of a case, mere neglect on the part of one of them to perform services, will not amount to an abandonment of the contract, but refusal might, under proper circumstances. *Ib.*

3. PAROL EVIDENCE. In an action by one attorney against another to recover one-half of the fee received by the latter for both under a written contract to render legal services, one of the defenses relied on was that defendant had employed, and paid a part of the fee to, other attorneys whose assistance he had obtained, with the consent of plaintiff and their client. *Held*, that this did not vary or alter the terms of the principal contract, and parol evidence of it was admissible. *Ib.*

4. ——. In such an action, the fact that the plaintiff is at the same time suing the client for his half of the fee, cannot affect his right of recovery. *Ib.*

5. ———. In such an action, it will be no defense to show that the attorneys could not have compelled payment of the fee if the client had chosen to resist, or that by an arrangement with the client, the defendant may have to refund it; or that the plaintiff did not render the services he ought to have rendered, or pay his portion of the incidental expenses. *Ib.*

6. The mere fact that the purchaser at an execution sale was the plaintiff's attorney affords no reason for allowing a person denying the validity of the sale, to take advantage collaterally of irregularities in the proceeding out of which the execution grew. *Bray v. Marshall*, 327.

7. ATTORNEY AND CLIENT: COMPROMISE OF SUIT. The compromise of a pending suit by an attorney having apparent authority, will be binding upon his client, unless it be so unfair as to put the other party upon inquiry as to the authority, or imply fraud. *Black v. Rogers*, 441.

BIGAMY.

JURISDICTION. An indictment for bigamy, when the unlawful marriage was contracted in this State, is cognizable only in the courts of the county where it was contracted, not where the parties may have afterward cohabited. *The State v. Fitzgerald*, 571

BONDS.

1. BANK OFFICER'S BOND: ADDITIONAL EMPLOYMENT: SURETIES' LIABILITY. The fact that the bookkeeper of a bank performs the duties of teller also, will not relieve the sureties in his bond given for the faithful performance of his duties as bookkeeper, from liability for errors committed by him in that capacity, unless the errors were in some way connected with some improper act on his part as teller, or were superinduced by his employment as such. *The Home Savings Bank v. Traube*, 199.

2. OFFICIAL BONDS. An official bond is binding upon all who sign it though it is not in the form prescribed by statute. *The State ex rel. Lafayette County v. O'Gorman*, 370.

3. DE FACTO BOARD OF EDUCATION: LIABILITY ON SCHOOL BONDS. A board of education which has long acted and been recognized as a legal body, cannot avoid liability on bonds issued on behalf of its school district, by showing that the district was not legally organized. *Franklin Ave. German Savings Inst. v. Board of Education of the Town of Roscoe*, 408.

4. SCHOOL BONDS: STATUTORY LIMIT ON SELLING PRICE. A board of education sold its bonds at ninety cents on the dollar, the purchaser charging and retaining out of the proceeds one per cent as a commission on the sale. A statute prohibited the bonds being sold at less than ninety cents on the dollar. *Held*, that this transaction was no violation of the statute. *Ib.*

TOWNSHIP BONDS. See Orr v. Lawrence Co., 246; Hays v. Dowis, 250.

BREAKING JAIL.

AS EVIDENCE OF GUILT. See The State v. Mallon, 355.

CAIRO & FULTON RAILROAD LANDS.

See The St. Louis, Iron Mountain & Southern Railway Company v. McGee, 522.

CITY MARSHALS.

POWER TO ARREST. A city marshal has no authority to make arrests for an offense not committed in his presence without a warrant. R. S. 1879, § 4998. *The State v. Underwood*, 230.

CLERKS OF COURTS.

COUNTY CLERKS: THEIR LIABILITY TO ACCOUNT FOR FEES The act of March, 1868, requiring the clerks of courts to render accounts and to pay into the county treasury all the emoluments of their offices beyond the allowances prescribed by the act, applied to the clerks of the county courts. Sess. Acts 1868, p. 54. *The State ex rel. Lafayette County v. O'Gorman*, 370.

COLLATERAL SECURITY.

CORPORATE STOCK HELD AS. See Fisher v. Seligman, 13.

COLOR OF TITLE.

WHAT CONSTITUTES, NOT A QUESTION FOR THE JURY. See Boogher v. Neece, 383.

CONFLICT OF LAWS.

1. SUIT BY A THIRD PARTY ON A CONTRACT FOR HIS BENEFIT: WITNESS. Where a third person sues upon a contract made for his benefit in the state of Louisiana (as by the law of that state he may) the fact that the other party to the contract is dead will not, in the courts of this State, prevent the party sued from testifying in his own favor. *Amonett v. Montague*, 43.

2. ——: REVOCATION: FAILURE OF CONSIDERATION. Under the law of Louisiana it is a good defense to an action by a third person upon a contract made for his benefit, to show either that the contract was rescinded by the parties before it was accepted by the plaintiff, or that the consideration for it has failed; and this rule

will be enforced by the courts of this State in such an action brought here upon a contract made in Louisiana. *Ib.*

3. NEGOTIABILITY OF NOTES MADE IN INDIANA. By the law of Indiana, such notes only are negotiable as are made payable at a bank in that state; and the name of the bank must be correctly stated in the note. This rule will be enforced in an action brought in this State upon a note executed in Indiana. Where, therefore, in an action brought upon such a note to charge the assignor as indorser, it appeared that there was no such bank as that named in the note; *Held*, that the action could not be maintained. *Stix v. Matthews*, 96.

CONSIDERATION.

SEE CONTRACTS.

CONSTABLES.

1. DEPUTY CONSTABLES: APPOINTMENT. A deputy constable who holds an appointment in writing, and has been sworn, may execute process, though his appointment has not been filed in the office of the clerk of the county court as required by statute. *The State v. Underwood*, 230.

2. POWER TO ARREST. A deputy constable may arrest without warrant if he has reasonable cause to suspect that a felony has been committed. *Ib.*

CONSTITUTIONAL LAW.

1. RULES OF CONSTRUCTION. When the constitutionality of a statute is to be determined, resort should not be made to mere verbal criticisms, subtle distinctions, abstract reasoning or nice differences in the meaning of words. It will be presumed to be constitutional till the contrary plainly appears, and it is only when it manifestly infringes some provision of the constitution that it can be declared void. In cases of doubt every possible presumption not directly and clearly inconsistent with the language and subject matter is to be made in favor of the statute. *The State ex rel. Harris v. Laughlin*, 147.

2. PUBLIC ACQUIESCENCE. The act in question in this case has been assumed to be valid by two decisions of the St. Louis court of appeals, and by one decison of this court, and the act has been acquiesced in for nearly five years by the people and all departments of the government. *Held*, that these facts were sufficient to create a reasonable doubt as to the correctness of the construction which would hold it unconstitutional, and this doubt must be resolved in favor of the act. *Ib.*

3. SPECIAL LEGISLATION: CLASSIFICATION BY POPULATION—BY OTHER CHARACTERISTICS: JUDICIAL NOTICE. The Notaries Act of 1881 is, both by its title and its first section, limited in its application to "all cities having a population of 100,000 inhabitants or more."

The 4th section provides that "the office of any notary public in such a city holding a commission bearing date prior to the passage of this act, and whose term of office as such notary public has not expired at the time this act becomes a law, shall be abolished at the expiration of ten days after the taking effect of this act."

Held, 1st, that the court would take judicial notice that the city of St. Louis was the only city in the State having 100,000 inhabitants at the time of the passage of the act, or which, by the usual increase of population, could be expected to have that number by the time the act should take effect; 2nd, that the 4th section, being applicable only to notaries "in such city," was special legislation and, therefore, unconstitutional; 3rd, that it was also special because it applied only to a particular class of notaries, viz: those whose commissions bore date prior to the passage of the act and had not expired when the act took effect. *The State ex rel. Harris v. Herrmann*, 340.

4. TITLE OF ACT. An act was entitled "An act to amend section 1547 of article 8 of the Revised Statutes, relating to offenses against public morals and decency, or the public police, and miscellaneous offenses." Section 1547 made gambling a misdemeanor; while the new act made it a felony and changed the penalty accordingly. *Held*, that the subject of the new act was expressed in the title with sufficient clearness to answer the requirements of section 28, article 4 of the constitution. *The State ex rel. Harris v. Laughlin*, 358.

5. MUNICIPAL TAXATION. Section 11, article 10 of the constitution of 1875, operates a limitation upon the power of the general assembly to authorize cities and incorporated towns to levy taxes, but of its own force, confers no power to levy them. *The State ex rel. Van Brown v. Van Every*, 530

6. THE TEXAS CATTLE ACT: ATTACHMENT BOND: DAMAGES. The obligors in an attachment bond given in a suit brought under the Texas Cattle Act to recover damages allowed by that act, cannot plead the invalidity of the act in avoidance of their liability on the bond. *The State ex rel. Cantwell v. Stark*, 566.

UNIFORMITY OF TAXATION. See City of St. Louis v. Spiegel, 145.

TAKING PRIVATE PROPERTY FOR PUBLIC USE. See Broadwell v. Kansas City, 213.

COMPULSORY PROCESS FOR WITNESSES FOR ACCUSED. See The State v. Underwood, 230.

THE TEXAS CATTLE ACT. See Urton v. Sherlock, 247.

CONTRACTS.

1. SUNDAY SALE: SUBSEQUENT RATIFICATION. A party having bought property on Sunday in consideration of an antecedent debt, during the succeeding week sent a receipt to the vendor for both the property and the debt. *Held*, a ratification of the contract. *Wilson v. Milligan*, 41.

2. RESCISSION: FAILURE OF CONSIDERATION: CONFLICT OF LAWS. Under the law of Louisiana it is a good defense to an action by a third person upon a contract made for his benefit, to show either that the contract was rescinded by the parties before it was accepted by the plaintiff, or that the consideration for it has failed; and this rule will be enforced by the courts of this State in such an action brought here upon a contract made in Louisiana. *Amonett v. Montague*, 43.

3. LIMITATIONS. A plea that a note is barred by the statute of limitations will be no defense to an action by the holder of the note against a party who has agreed with the maker to pay it. *Ib.*

4. PURCHASER FOR VALUE: CONSIDERATION. The giving of further time for the payment of an existing debt is a valuable consideration and is sufficient to support a mortgage as a purchase for a valuable consideration. *Cass County v. Oldham*, 50.

5. CONTRACT TO CUT AND REMOVE TIMBER: MEANING OF THE WORD "TIMBER:" REASONABLE TIME. Plaintiffs' assignor contracted for the right to enter upon defendant's land and "cut all the white-oak, burr-oak, spanish-oak, elm and walnut that is upon said land, and remove said timber within twelve months. * * All of said timber not removed from said land within twelve months, whether cut or standing, is to be the property of" the defendant The contract did not say for what purpose the timber was to be cut. *Held*, that the term "timber," as used in the last clause of the contract, meant trees standing, or felled and lying in their natural state upon the land, and did not include railroad ties made out of the trees; and that plaintiffs were entitled to a reasonable time after the expiration of the twelve months to remove these. *Hubbard v. Barton*, 65.

6. ATTORNEYS AT LAW: JOINT CONTRACT FOR SERVICES: ABANDONMENT. If attorneys, by joint contract, undertake the defense of a case, mere neglect on the part of one of them to perform services, will not amount to an abandonment of the contract, but a refusal might under proper circumstances. *Henry v. Bassett*, 89.

7. ABANDONMENT OF CONTRACT: A QUESTION OF LAW. What constitutes abandonment of a contract is a matter of law, and the court should instruct the jury as to the effect of the facts they may find, bearing upon the question, and not leave it to them to say, without such instruction, whether a contract has been abandoned or not. *Ib.*

8. SECRET CONTRACT OF AGENT WITH ADVERSE PARTY. A dealer in lumber agreed to pay to a builder, who was employed to superintend the erection of buildings for others, and whose duty it was to pass upon accounts presented for materials furnished, but not to make purchases, a commission on all sales of lumber made to the builder's employers through his influence. This agreement was not made known to the employers. *Held*, that it was against public policy and void. *Atlee v. Fink*, 100.

9. A creditor of a firm may release one member of the firm without discharging the others. *Grant v. Holmes*, 109.

10. MARRIAGE CONTRACT. A marriage contract is binding between the parties and their legal representatives, although not acknowledged or proved and recorded. *Klenke v. Koeltze*, 239.

11. RECEIPT: PAROL EVIDENCE. So far as a receipt is a mere acknowledgment of payment, it is not conclusive; but if it is not a mere receipt, but constitutes and imports a contract, it is as any other written agreement, and cannot be contradicted or enlarged by parol testimony. *Carpenter v. Jamison*, 285.

12. PRESUMPTION OF SETTLEMENT OF DEMANDS. Where it was conceded by the pleadings that the consideration of a note given upon a settlement between the plaintiff's intestate and defendant, was services rendered by the intestate; *Held*, that this rebutted the presumption which would otherwise have arisen that the settlement embraced all the demands between the parties. *Wade v. Hardy*, 394.

13. PROMISSORY NOTES: CONSIDERATION. C. being indebted to plaintiffs upon a purchase of goods, transferred the goods to K. as part of the price of land purchased of K. C. afterward re-sold the land to K. and received as part of the price, the note of K. for $1,000. He then transferred this note to S. as part of the price of another tract of land bought of S., and secured this note, with others for the remainder of the purchase money, by a deed of trust upon this land. Plaintiffs threatened proceedings in bankruptcy against C., to prevent which he and K. induced S. to indorse without recourse the $1,000 note to plaintiffs, and to place the same in escrow with a third party, to be delivered to plaintiffs in satisfaction of C.'s indebtedness, upon the execution and delivery to S. by C. of a deed of trust upon said tract of land securing a like amount, which C. then promised to do, and afterward did. *Held*, that this promise and the abandonment of the threatened proceedings in bankruptcy were sufficient consideration for the indorsement to plaintiffs by S. of the $1,000 note. *Bell v. Simpson*, 485.

14. OFFER BY LETTER: ACCEPTANCE. To make a binding contract, the offer and the acceptance must correspond in every particular. If the offer be by letter, the acceptance must be communicated in some way, either actually or constructively, without unreasonable delay. Express notice of acceptance can only be dispensed with when it is apparently not contemplated, and some other act is equally clear and unequivocal. *Robinson v. The St. Louis, Kansas City & Northern Railway Company*, 494.

15. CONTRACT: DISAFFIRMANCE FOR FRAUD. The right to disaffirm a contract for fraud, must be exercised promptly, and the disaffirmance must be *in toto*. *Estes v. Reynolds*, 563.

16. CONSIDERATION, WHAT IS A SUFFICIENT: SURETY: RELEASE BY EXTENSION OF TIME. A consideration may be good in law though it be of no value to the party to whom it moves. If it be a damage or inconvenience to the other party, that will be sufficient. Thus, where the holder of a promissory note agreed with the maker to extend the time of payment provided he would get A. (a married woman) to sign the note; *Held*, that the procurement of A.'s signature (though for want of a separate estate it was of no legal effect), was a sufficient consideration for the extension, and that a surety,

without whose consent the signature had been obtained, was thereby discharged. *Williams v. Jensen*, 681.

CONTRACT RIGHT TO VOTE STOCK. See Fisher v. Seligman, 12.

CONTRACT FOR HIRE OF MINOR. See Sherlock v. Kimmell, 77.

CONVERSION.

One who innocently obtains the property of another from a third party, may when informed of the right of the true owner, lawfully return it to the person from whom he obtained it, provided he does this before demand made or suit brought; but if he asserts any title in himself, or if he returns it after demand made, he will be guilty of conversion. *Rembaugh v. Phipps*, 422.

CORPORATION.

1. STOCKHOLDER'S LIABILITY. To sustain a claim of a right by contract to vote stock in a corporation without incurring the obligations of a stockholder, it must appear that at the time the stock was voted there was a contract in force authorizing the holder to vote it. Hence, where a corporation deposited its own unpaid and unsubscribed stock with a banking firm as security for advances to the corporation, to be held by the firm for the period of one year, but with no provision for voting the stock, and after the lapse of the year the firm did vote it and thereby elected their own board of directors and so ultimately obtained complete control of the corporation; *Held*, that they had thereby brought themselves within the rule of liability laid down in *Griswold v. Seligman*, 72 Mo. 110. *Fisher v. Seligman*, 13.

2. ——— : ESTOPPEL. One who would be estopped to deny, as against a corporation, that he is a stockholder thereof, will also be held estopped as against a judgment creditor of the corporation. *Ib.*

3. ———. No person will be regarded as holding stock as a "trustee" or by way of "collateral security," within the meaning of section 9, Wagner's Statutes, page 301, and, therefore, exempt from liability as a stockholder, unless it has come into his possession by original subscription as trustee for some person other than the corporation, or by derivative title as trustee, or by way of collateral security after it has already been issued by the corporation in the ordinary course of business. *Ib.*

4. ———. Courts will be sedulous in their endeavors to defeat all schemes and contrivances whereby parties may seek to receive and enjoy the benefits and privileges incident to the position of a stockholder and at the same time to be exonerated from the burdens imposed by law. *Ib.*

5. STOCKHOLDER'S LIABILITY: PARTNERSHIP. Where a partnership owns stock in an insolvent corporation, a member of the firm will be liable to an execution against himself individually, as a stockholder, upon the motion of a creditor of the corporation, in all

cases where the firm would be subject to such liability. *Bray's Administrator v. Seligman's Administrator* 31.

6. RATIFICATION BY A CORPORATION of the unauthorized act of its agents is equivalent to previous authorization. It need not be manifested by a vote or formal resolution, or be authenticated by the seal of the corporation. It will be inferred from failure promptly to disavow the act when it comes to the knowledge of the corporation. *The First National Bank of Springfield v. Fricke*, 178.

7. MALICIOUS PROSECUTION. A corporation is liable to an action for malicious prosecution instituted by its authority. *Gillett v. Mo. Valley R. R. Co.*, 55 Mo. 315, overruled. *Boogher v. The Life Association of America*, 319.

8. PAROL EVIDENCE TO EXPLAIN AMBIGUOUS INSTRUMENT. Where a bond appearing on its face to be the obligation of a corporation leaves it doubtful what corporation is intended, parol evidence will be received to explain the ambiguity. *Franklin Ave. German Savings Inst. v. Board of Education of the Town of Roscoe*, 408.

9. ULTRA VIRES. The obligor in a bond in the hands of a corporation, will not be allowed to show, for the purpose of defeating recovery on the bond, that the corporation has no power to hold or sue upon it. The State alone is the proper party to institute such an inquiry. *Ib.*

10 CORPORATE NAME. A family name not conjoined with a christian name is not "the name of a person" within the meaning of the statute which makes the word "company" or "corporation" an essential part of the name of every corporation assuming the name of a person or firm. R. S. 1879, § 762. Hence, the name "*Mallinckrodt* Chemical Works" does not come within the statutory requirement. *The State ex rel. Mallinckrodt v. McGrath*, 424

11. ———. The object of the statute is to prevent corporations from conducting business in the names of firms and individuals, thereby misleading the public into the belief that they are dealing with individuals and are entitled to the protection offered by their personal liability. *Ib.*

12. CORPORATION: ASSIGNMENT FOR BENEFIT OF CREDITORS. A corporation may make an assignment for the benefit of creditors under the State law. R. S. 1879, § 354. *Shockley v. Fisher*, 498.

13. ———: ———. Unpaid balances upon stock subscriptions are corporate assets and are assignable. *Ib.*

14. ———: ———. If such an unpaid balance be properly assigned, it passes to the assignee and he may collect it. *Ib.*

BANK OFFICER'S BOND: ADDITIONAL EMPLOYMENT: SURETIES' LIABILITY. See Home Savings Bank v. Traube, 199.

COSTS.

UPON REMITTITUR IN APPELLATE COURT. See Higgs v. Hunt, 106.

RETAXATION OF. See McGindley v. Newton, 115.

RIGHT TO DISMISS ON PAYMENT OF. See State ex rel. Dixon v. Givan.

COUNTY.

1. The county courts have no power to issue certificates of county indebtedness. Such a certificate is, therefore, no evidence of debt. *Smallwood v. Lafayette County*, 450.

2. SET-OFF: DEBTS DUE IN CAPACITY OF TRUSTEE. A demand due to a county for money borrowed of the county school fund may be set-off against a demand due by the county for services rendered on behalf of the same fund, and which by contract are to be paid for out of it. The county stands in the position of trustee as respects both demands. *Ib.*

COURTS.

1. SPECIAL JUDGE. When a special judge, selected by the parties, by their consent has tried a cause without being sworn, neither of them will afterward be heard to urge this as an objection to the validity of the judgment. *Grant v. Holmes*, 109.

2. TO SET ASIDE FRAUDULENT CONVEYANCE. The fact that the fraudulent debtor is dead does not make such an action cognizable in the probate court. His estate has no interest in the matter. The circuit court is the proper forum. *Zoll v. Soper*, 460.

3. SPECIAL JUDGE: PROCEEDINGS FOR HIS ELECTION. Under the statute in relation to the election of a special judge in cases where the regular judge is disqualified to sit, (and in certain other cases,) from the time that the disqualification is ascertained all the judicial powers of the regular judge cease so far as that case is concerned. The statute imposes upon the clerk the duty of holding the election, and the judge has no power to make any order in respect thereto. Hence, where the person elected was known to the judge to have been of counsel in the case, and for this reason he set aside the election and caused a new one to be held; *Held*, that this was error. *Lacy v. Barrett*, 469.

4. ——: ——. It is for the parties to a cause, and not the judge, to object to a person elected special judge on the ground of disqualification; and when the objection is made it must be to the clerk. The duty of holding a new election rests upon him. *Ib.*

5. ——: PRACTICE. Where a case tried before a special judge, on account of disqualification of the regular judge, is remanded for a new trial, if the regular judge has been succeeded in office by one who is not disqualified, the new trial will be had before him as if no special judge had ever been elected. *Ib.*

ST. LOUIS CRIMINAL COURT. See The State ex rel. Harris v. Laughlin, 147.

CIRCUIT COURT: JURISDICTION TO SETTLE ACCOUNTS OF PUBLIC OFFICERS. See The State ex rel. Lafayette County v. O'Gorman, 370.

——— TO SET ASIDE FRAUDULENT CONVEYANCE. See Zoll v. Soper, 460.

———IN ACTION ON ADMINISTRATOR'S BOND. See The State ex rel. Longdon v. Shelby, 482.

COVENANT.

1. RIGHT TO SPECIFIC PERFORMANCE. The representatives of the covenantee may proceed in equity to compel specific performance, where the covenant is one which runs with the land. *Baker v. The City of St. Louis*, 671.

2. COVENANT RUNNING WITH THE LAND. A covenant in a conveyance of realty to a city for a street and market house, that the lot shall revert and the grantee re-convey when the ground ceases to be used for a market, runs with the land, the grantors retain the fee subject to the easement, and abandonment gives a right of re-entry. *Ib.*

3. COVENANT TO RE-CONVEY IN CASE OF BREACH. The covenant to reconvey relieves the grantors from the rule which requires that the reversioner shall enter before he can maintain a claim of forfeiture for a breach of a condition subsequent. *Ib.*

CRIMINAL LAW.

1. ABSENT WITNESSES: CONTINUANCE. The statute which enables the prosecution to force the accused to trial notwithstanding the absence of a witness, by admitting that if present the witness would testify as stated in the application of the accused for a continuance, is not a violation of the constitutional guaranty that the accused shall have compulsory process for his witnesses, but it goes to the very verge of the constitution and must not be so construed as to permit a distinction to be taken between such testimony and the testimony of witnesses present. The intention is, that the statutory testimony shall be entitled to the same weight as if the witness was present at the trial. *The State v. Underwood*, 230.

2. EVIDENCE OF OTHER OFFENSES. While it is true as a general rule that on the trial of one accused of a crime evidence of other crimes committed by him is inadmissible, yet where the testimony relates to a conversation of the accused wherein he admits the commission of the offense charged and also another crime, it is proper to give in evidence the whole conversation. *Ib.*

3. THREAT TO ARREST: HOMICIDE. The mere announcement of an intention to arrest, without the actual use of force, by a person not authorized to make arrests, will not justify the person threatened in killing him. *Ib.*

4. PROOF OF VENUE. No principle is better settled than that in a criminal case the venue must be proved as laid in the indictment. The proof may be either direct or indirect, but it must be one or the other, and the record must show it, or this court will reverse. *The State v. Hartnett*, 251; *The State v. Burgess*, 541.

5. RAPE: EVIDENCE. In a prosecution for rape, the prosecuting witness was asked by defendant's counsel what her object was in going to Scott's station, (where the rape was alleged to have been committed,) but the court refused to permit her to answer. *Held*, error. *The State v. Hartnett*, 251.

6. MURDER. Instructions are erroneous, which authorize the jury to convict of murder in the first degree without requiring them to find both malice and deliberation; and the error is not cured by the giving of an instruction which correctly defines the offense. *The State v. Pacquett*, 330.

7. EVIDENCE: BREAKING JAIL. Evidence that one accused of a crime has broken or attempted to break jail, is admissible, as tending to prove guilt. On the other hand evidence on the part of the accused explanatory of such attempt and tending to show that it was not prompted by a consciousness of guilt but by other considerations consistent with innocence, is equally admissible. *The State v. Mallon*, 355

8. BURGLARY AND LARCENY: INDICTMENT IN ONE COUNT: AUTERFOIS ACQUIT. Where a defendant indicted for burglary and larceny in one count, as permitted by the statute, is acquitted of one and convicted of the other, the acquittal is conclusive upon that branch of the charge. If the conviction be afterward set aside, a new trial will be ordered only upon the other branch. R. S. 1879, § 1301. *The State v Bruffey*, 389

9. ABSENT WITNESS: CONTINUANCE. The statute which enables the prosecution to force the accused to trial notwithstanding the absence of a witness, by admitting that if present the witness would testify as stated in the application of the accused for a continuance, (R. S. 1879, § 1886,) can only be invoked by the State after the accused, by exercising reasonable diligence, shall have unsuccessfully employed the power of the court to secure the personal presence of such of his witnesses as may be within the reach of its process. It does not apply to a case where a subpœna has been seasonably issued, but for want of time has not been returned. *The State v. Hickman*, 416.

10. ——: IMPEACHING EVIDENCE. In a criminal case, when the prosecution, in order to avoid a continuance, has admitted that an absent witness if present would give testimony as stated in defendant's application for a continuance, evidence will not be received, by way of impeaching such testimony, that the witness has made a contradictory statement. *Ib.*

11. EVIDENCE: STATEMENT OF CONFEDERATE. Statements made by one jointly indicted with the defendant, long after the commission of the alleged offense, and not in the presence of the defendant, are not admissible against him. *Ib.*

12. BIGAMY. JURISDICTION. An indictment for bigamy, when the unlawful marriage was contracted in this State, is cognizable only in the courts of the county where it was contracted, not where the parties may have afterward cohabited. *The State v. Fitzgerald*, 571.

13. APPREHENSION OF OFFENDER, AS GROUND OF JURISDICTION. Where the apprehension of an offender is made a ground of jurisdiction, the apprehension must have occurred prior to the finding of the indictment and must be alleged in the indictment. *Ib.*

14. PENDENCY OF FORMER INDICTMENT. The pendency of a former indictment for the same offense is no bar to the second indictment. R. S. 1879, § 1808. Overruling *State v. Smith*, 71 Mo. 45. *The State v. Eaton*, 586.

15. WITNESSES. The State is not bound to call as witnesses all the persons who are cognizant of a criminal transaction. See *State v. Kilgore*, 70 Mo. 546. *Ib.*

16. SELF-DEFENSE. To justify a homicide on the ground of self-defense, it is sufficient to show an apparent danger affording a reasonable ground for apprehension on the part of the slayer that unless he kill or disable his adversary, his own life or limbs are in imminent peril. *Ib.*

17. THREATS. One whose life has been threatened is not bound to wait, before he begins to defend himself, for personal violence or an assault made upon him. On the other hand, he has no right to hunt up the threatener and slay him, or to take his life at all unless the threatener, when they meet, by his conduct manifests a purpose to carry the threat into execution. *Ib*

CRIMINAL LIABILITY OF PRINCIPAL FOR ACT OF AGENT. See The State v. Reiley, 521.

See also False Pretenses, Forgery, Gambling, Horse-racing, Larceny, Murder, Petroleum.

CURTESY.

IN WIFE'S SEPARATE ESTATE. See Tremmel v. Kleiboldt, 255.

DAMAGES.

1. PARENT AND CHILD: CONTRACT OF HIRING: MEASURE OF DAMAGES. If a minor son hire himself out without the knowledge of his father, the father may either adopt the contract and claim whatever is due under it, or he may repudiate it and claim the value of his son's services. In the latter event, if it appears that the employer has permitted the son to use a part of his time for his own purposes, the measure of recovery will be the value of his entire time, less the value of the privilege so accorded to him. *Sherlock v. Kimmell*, 77.

2. WILLFULLY CAUSING HORSES TO BREAK AWAY: DAMAGE BY COLLIS-

ION. Defendant finding a team of horses hitched to a post in the street in front of his premises, willfully and intentionally threw a stream of water from a hose upon them, whereby they were frightened and breaking away ran down the street and collided with plaintiff's team. *Held*, that plaintiff was entitled to recover of defendant the damage caused by the collision. *Forney v. Geldmacher*, 113

3. RENTS AND PROFITS. An instruction in relation to the mode of estimating rents and profits; *Held*, not objectionable. *Pray v. arshall*, 327.

4. MEASURE OF DAMAGES. A father whose child has been injured through the negligence of another, is entitled to recover, as damages, an amount which will fully compensate him for the loss of service and care of the child, and the expense resulting from the injury for a period not extending beyond the minority of the child, including surgical attention, care, nursing and the like. *Frick v. The St. Louis, Kansas City & Northern Railway Company*, 542.

5. THE TEXAS CATTLE ACT: ATTACHMENT BOND: DAMAGES. The obligors in an attachment bond given in a suit brought under the Texas Cattle Act to recover damages allowed by that act, cannot plead the invalidity of the act n avoidance of their liability on the bond. *The State ex rel. Cantwell v. Stark*, 566.

6. ——— : ——— : MEASURE OF DAMAGES. In an action on such a bond the recovery is not confined to the damages that may have occurred by reason of the attachment, but may include any damages directly occasioned by any process or proceeding in the suit. *Ib.*

7. ACTION FOR PERSONAL INJURIES: VERDICT. To authorize a verdict for substantial damages in an action by a parent for the negligent killing of his infant child, it is not necessary to make proof of the amount of damages sustained. The jury may infer this from all the facts in evidence. *Nagel v. The Missouri Pacific Railway Company*, 653.

8. ——— : MITIGATING AND AGGRAVATING CIRCUMSTANCES. It seems that a general instruction to the jury, in an action by a parent for the negligent killing of his infant child, that in determining the amount of the verdict they should have "regard to the mitigating and aggravating circumstances," is bad; the instruction should designate what circumstances are to be considered as mitigating or aggravating damages But if there are no mitigating circumstances in evidence, the defendant cannot complain of such an instruction for its generality. *Ib.*

9. ———. If an injury received through the negligence of the defendant be the immediate cause of the death of the injured person, the fact that he was unskillfully treated and that this contributed to his death will be no defense to an action by the next of kin. *Ib.*

10. RAILROAD: KILLING ANIMALS: MEASURE OF DAMAGES. If the owner of an animal killed upon a railroad track uses or gives away the carcass, the company will be entitled to have the value of the carcass

deducted in estimating the damages. *Case v. The St. Louis & San Francisco Railroad Company* 668.

CAUSED BY CHANGE OF STREET GRADE. See Stickford v. The City of St. Louis, 309.

——— BY CONTINUANCE OF NUISANCE. See Wayland v. The St. Louis, Kansas City & Northern Railway Company, 548.

DEEDS.

1. RECORD OF VOID DEED. The record of a deed which is void for insufficiency of description, is not constructive notice, and will not put a stranger upon inquiry. *Cass County v. Oldham*, 50.

2. MARRIED WOMAN'S DEED : ACKNOWLEDGMENT. The officer's certificate of acknowledgment to a married woman's deed is *prima facie* evidence that it was voluntarily executed. *Clark v. Edwards' Administrator*, 87.

3. SHERIFF'S DEED: RECITALS. A sheriff's deed executed in pursuance of a power conferred by a mortgage to the county, will be void if it fails to recite that a certified copy of the order of the county court requiring the sheriff to foreclose was delivered to him and that the sale was made in pursuance of the order; but if these are facts, the purchaser may obtain a new deed properly reciting them. *Carter v. Reeves*, 104

4. DEEDS: COPIES AS EVIDENCE. Copies of deeds are not generally admissible in evidence without proof of loss of the originals. *West v. West's Administrator*, 204.

5. MARRIAGE CONTRACT. A marriage contract is binding between the parties and their legal representatives, although not acknowledged or proved and recorded. *Klenke v. Koeltze*, 239

6. PRESUMPTION OF DEED. A deed will not be presumed where there is a chain of title apparently perfect, and upon which the possessor appears to have relied to sustain his possession.
Thus, where plaintiff in ejectment at the trial in 1877 offered in evidence deeds constituting a complete chain of title, including a deed from one L. dated in 1817, and in addition showed possession in himself and those under whom he claimed from 1841 or 1842 down to 1872, and defendant, in rebuttal, showed an outstanding title in one G. under a conveyance from L. dated in 1808; *Held*, that there was no ground to presume a re-conveyance from G. to L. between 1808 and 1817. *Dunn v. Miller*, 260.

7. SHERIFF'S DEED. Failure of the sheriff to make return of a sale under execution, as required by law, does not affect the validity of his deed. *Bray v. Marshall*, 327.

8. ———. A certificate of acknowledgment to a sheriff's deed; *Held*, sufficient. *Ib.*

9. COPY OF RECORD AS EVIDENCE: WAIVER. A certified copy of the record of a deed acknowledged in conformity to the laws of the Territory of Missouri in force when the acknowledgment was taken, may be admitted in evidence, without proof of the loss or destruction of the original. Under section 30 of the chapter on conveyances, (R. S. 1879, § 697,) an affidavit that the original is not in the power of the party offering the copy, is all that is necessary, and this will be deemed to be waived if the adverse party fails to object at the trial for want of such affidavit. *Boogher v. Neece*, 383.

10. QUIT-CLAIM DEED: RECORD OF DEEDS. A quit-claim deed will pass the title of the grantor as against a prior unrecorded deed from the same grantor, provided the grantee have no notice of the prior deed. *Ib.*

11. SHERIFF'S DEED UNDER SCHOOL MORTGAGE. A sheriff's deed executed in pursuance of a power conferred by a mortgage to the county, will be held void if it fails to recite sufficient authority for making the sale, and it does not otherwise appear that there was such authority. *Neilson v. Sasse*, 386.

12. QUIT-CLAIM DEED: RECORDING ACTS. A quit-claim deed received in good faith for a valuable consideration, without notice of a prior unrecorded deed, will prevail over such prior deed. *Willingham v. Hardin*, 426.

13. SHERIFF'S DEED: CERTIFICATE AND RECORD ENTRY OF ACKNOWLEDGMENT. It is not the intention of the law in relation to sheriffs' deeds that the clerk's certificate of acknowledgment indorsed on the deed shall be a copy of the entry made on the record. The former should contain but a brief statement of the fact of acknowledgment; the latter must set forth, in addition, the names of the parties to the suit and a description of the property conveyed. R. S. 1879, § 2394. *Lincoln v. Thompson*, 613.

14. ———: ACKNOWLEDGMENT. As against a purchaser for value and without notice of an execution sale, a sheriff's deed made in pursuance of the sale but not acknowledged till thirteen years after ward, will not be allowed to take effect as of the time of the sa e *Ib.*

15. ———: VARIANCE BETWEEN DEED AND CERTIFICATE OF ACKNOWLEDGMENT. A deed running in the name of G. as sheriff, and executed by him, recited, among other things, that the execution was delivered to L., "then sheriff" of C. county, that L., after making a levy, transferred the execution to G. "as his successor in the said sheriffalty, upon the expiration of his (L.'s) term of office," and that G. "sheriff as aforesaid" gave notice and made the sale. The clerk's certificate of acknowledgment indorsed upon the deed on the day of its date, stated that L., "sheriff of C. county," produced "a deed executed by himself as sheriff as aforesaid * * and said sheriff acknowledged said deed to be his act and deed." *Held*, (by GANTT, Special Judge, HOUGH and HENRY, JJ., concurring; SHERWOOD, C. J., and RAY, J., dissenting,) that in the absence of any evidence tending to show that it was really G., and not L., who acknowledged the deed, it could not be held that the appearance of L.'s name in the clerk's certificate was a clerical error. Whether the court could have heard such evidence, if it had been offered, was not decided. *Ib.*

DEEDS OF TRUST AND MORTGAGES.

1. UNRECORDED CHATTEL MORTGAGE: PURCHASER WITH NOTICE. A purchaser of personal property from a mortgageor in possession will hold it against the mortgage, if unrecorded, even though he had notice of it—at least, if it remains unrecorded an unreasonable length of time. *Wilson v. Milligan*, 41.

2. PURCHASER FOR VALUE: CONSIDERATION. The giving of further time for the payment of an existing debt is a valuable consideration and is sufficient to support a mortgage as a purchase for a valuable consideration. *Cass County v. Oldham*, 50.

3. MORTGAGEE IN POSSESSION: HIS LIABILITY FOR RENTS, ETC. If a mortgagee enter into possession and then permits the mortgageor to take the profits or to use the mortgage to keep off other creditors, he will be required to account, at the suit of the latter for the rents and profits for the time he is in possession. In the absence of fraud or neglect of duty he will be required to account for only such as are actually received. *Ely v. Turpin*, 83.

4. TRUSTEE FOR BENEFIT OF CREDITORS: BOUND TO COLLECT RENTS. If a trustee for the benefit of creditors permits the debtor to take the rents and profits of the trust land, he will be held personally liable for their value, less taxes and the cost of repairs and necessary improvements, but without rests. *Ib.*

5. The judgment of the court below enjoining a sale under a deed of trust is affirmed, on the ground that the note which the deed of trust was given to secure, was without consideration. *Ryan v. Gilliam*, 132.

6. SHERIFF'S SALE: RELEASE OF INCUMBRANCE. Where the creditors of a vendor who has conveyed his homestead extinguish an incumbrance thereon, and sell the property under execution against the vendor, the purchaser at the sheriff's sale cannot have the original incumbrance enforced against the property in an action brought to set aside the sheriff's deed. The release was executed without instigation from the debtor's vendee, and the purchaser at sheriff's sale cannot be relieved from the consequences of his erroneous impression that the homestead property conveyed was subject to the claims of the vendor's creditors. *Beckmann v. Meyer*, 333.

7. SHERIFF'S DEED UNDER SCHOOL MORTGAGE. A sheriff's deed executed in pursuance of a power conferred by a mortgage to the county, will be held void if it fails to recite sufficient authority for making the sale, and it does not otherwise appear that there was such authority. *Neilson v. Sasse*, 386.

8. MORTGAGE: RIGHT OF REDEMPTION. In a suit to redeem land sold under a mortgage, the defendant relied, for a defense, on the fact that he had from time to time since his purchase made improvements in good faith and with the knowledge of the mortgageor and without objection on his part. It was shown, however, that the improvements were but usual and customary repairs, not exceeding the rents in value, and that there was no material change in the value of the property. Defendant was the purchaser at the mort-

gage sale, and there had been no loss of evidence preventing a full presentation of the case. *Held*, that there was nothing to defeat plaintiff's right of redemption *Ib.*

9. TRUSTEE'S SALE. When enough has been realized from the sale of a portion of the property covered by a deed of trust to pay the debt, the trustee's power is at an end, and any further sale is a nullity. *Baker v. Halligan*, 435.

10. The indorsement without recourse of a note secured by deed of trust, carries with it the trust deed as a security. *Bell v. Simpson*, 485.

DRAMSHOPS.

1. SELLING LIQUOR ON SUNDAY. The statute against selling liquor on Sunday, (Wag. Stat., p. 504, § 35,) prohibits the sale of "any fermented *or* distilled liquor." An indictment charged defendant with selling "fermented *and* distilled liquor." *Held*, that this was no defect. The object of the statute is to prevent the sale of liquor on Sunday, whether the liquor be fermented or distilled or a mixture of both. *The State v. Nations*, 53.

2. DRUGGISTS: SELLING LIQUOR WITHOUT LICENSE. The act of 1877 in relation to the sale of intoxicating liquor makes it a misdemeanor for a druggist, without taking out a license as a dram-shop keeper, either (1) to sell or give away (except for medicinal purposes) intoxicating liquors in any quantity less than one gallon, or (2) to permit intoxicating liquor, no matter for what purpose or in what quantity sold, to be drunk on the premises where sold. *The State v. Reiley*, 521.

3. ——: ——: PRINCIPAL AND AGENT. A druggist will be held criminally liable for the act of his clerk committed in his absence in selling liquor in violation of law, unless he shows that the sale was made without his assent. *Ib.*

DRUGGIST.

SELLING LIQUOR WITHOUT LICENSE. See The State v. Reiley, 521.

EJECTMENT.

1. PLAINTIFF'S TITLE. In ejectment it is error for the court to leave it to the jury to determine whether the plaintiff is the owner of the premises, without instructing them as to the legal effect of the deeds read in evidence. *Hunt v. The Missouri Pacific Railway Company*, 252.

2. ——. If plaintiff's paper title be insufficient he can only recover either upon the ground of continued adverse possession for ten years prior to defendant's entry, or upon proof of prior possession under claim of right. *Ib.*

3. WRIT OF POSSESSION. In contemplation of law the enforcement of a writ of possession in an action of ejectment puts an end to the adverse possession of defendant as of the day of the institution of the suit. *Dunn v. Miller*, 260.

4. Plaintiff in ejectment cannot recover upon a prior possession of less than ten years since the emanation of the legal title from the United States government, when defendant's present possession is under claim and color of title; especially if he obtained possession from the plaintiff by a former action of ejectment. *Ib.*

5. OUTSTANDING TITLE: ADVERSE POSSESSION. Adverse possession will avail nothing as against a good outstanding title unless it has been held for the statutory period. *Ib.*

6. Instructions which leave it to the jury to determine what facts constitute adverse possession or color of title, are properly refused. *Boogher v. Neece*, 583.

EQUITY.

1. SHERIFF'S SALE: RELEASE OF INCUMBRANCE. Where the creditors of a vendor who has conveyed his homestead extinguish an incumbrance thereon, and sell the property under execution against the vendor, the purchaser at the sheriff's sale cannot have the original incumbrance enforced against the property in an action brought to set aside the sheriff's deed. The release was executed without instigation from the debtor's vendee, and the purchaser at sheriff's sale cannot be relieved from the consequences of his erroneous impression that the homestead property conveyed was subject to the claims of the vendor's creditors. *Beckmann v. Meyer*, 333.

2. JUDGMENT FOR POSSESSION. Judgment for possession may follow the final ascertainment of a party's title as against his adversary in possession in a proceeding in equity. *Baker v. The City of St. Louis*, 671.

MARRIED WOMAN'S OBLIGATION: ITS GENERAL NATURE; ENFORCEMENT OF IT, AFTER HER DEATH. See Davis v. Smith, 219: Klenke v. Koeltze, 239; Boatmen's Savings Bank v. Collins, 280.

ESTATES.

1. ESTATE IN REMAINDER: LIABILITY TO EXECUTION: VOLUNTARY CONVEYANCE. A deed conveyed land in trust for the sole and separate use of A. (a married woman) for and during her natural life, remainder in fee simple in trust for J. (her husband) should he survive A., with covenants on the part of the trustee that upon the death of either A. or J., whichever died first, he would convey to the survivor, and if A. and J. at any time during their joint lives, should wish to sell, then that he would, upon their joint request in writing, convey to any person designated by them, and pay over the purchase money to A., or invest the same in other property to be held upon like trusts, as A. and J. might direct.

Held, that the deed created in J. an equitable estate in remainder

in fee, but whether the remainder was vested or contingent the court did not deem necessary to decide. Whichever it was, it was liable to be taken in execution.

Held, also, that the covenant of the trustee as to selling and paying the proceeds to A. did not amount to a reservation of a right in A. to defeat J.'s estate, since the trustee was to act only upon the joint request of A. and J.

Held, also, that a voluntary conveyance by J. of his interest was ineffectual as against his creditors. *White v. McPheeters*, 286.

2. STREETS: PARTITION OF ABUTTING LANDS: RIGHTS OF PARTITIONERS IN STREET. Where the grantors have made partition of the ground bounded on one side by the dedicated street, the deeds carry the fee, subject to the easement, to the center of the street, and each grantee takes in severalty a reversionary right in so much of the street as pertains to the lot acquired by him in partition, which he may assert against the city. *Baker v. The City of St. Louis*, 671.

ESTOPPEL.

1. BY ACTS IN COURT. A party who has tried his case upon a theory involving the tacit concession of a particular fact, will not be permitted in the appellate court to obtain a reversal of the judgment against him upon a theory involving a denial of that fact. *Bray's Administrator v. Seligman's Administrator*, 31.

2. PLEADING. Facts relied upon as an estoppel *in pais* must be specially pleaded; otherwise evidence of them cannot be received. *Bray v. Marshall*, 327.

3. ATTORNMENT. The fact that A., the vendee of homestead property which was afterward sold under execution against the vendor, recognized the validity of the latter sale so far as to attorn to the purchaser at the sheriff's sale, does not estop him from asserting his rights by a proceeding to set aside the sheriff's deed. *Beckmann v. Meyer*, 333.

4. EQUITABLE ESTOPPEL. The owner of the legal title to real estate, whose deeds had been duly recorded, was *held* estopped to assert such title against one whom he advised and encouraged to buy such property at sheriff's sale, at which he himself was a bidder, to whom after such purchase he surrendered the possession, and who with his knowledge and approval made valuable improvements thereon, and who so purchased and improved, relying upon the assurance of such owner that, if he did so, he would acquire the superior title and would not be troubled by the assertion of any claim on the part of such owner *Peery v. Hall*, 503.

5. ———. The owner of the legal title to real estate, where deeds had been duly recorded, was *held* estopped to assert such title against one who exchanged a house and lot for such real estate with one then in the possession thereof as the apparent owner, who had made valuable improvements thereon with the knowledge and approval of the true owner, from whom the possession had been acquired, and who to facilitate the exchange transferred a deed of trust held by him from such house and lot to such real estate. *Ib.*

AS A METHOD OF CREATING STOCKHOLDER'S LIABILITY. See Fisher v. Seligman, 13.

EVIDENCE.

1. In an action by a father to recover wages due his minor son, statements made by the son are not admissible as evidence against the father. *Sherlock v. Kimmell*, 77.

2. WRITTEN CONTRACT: PAROL EVIDENCE. In an action by one attorney against another to recover one-half of the fee received by the latter for both under a written contract to render legal services, one of the defenses relied on was that defendant had employed, and paid a part of the fee to, other attorneys whose assistance he had obtained, with the consent of plaintiff and their client. *Held*, that this did not vary or alter the terms of the principal contract, and parol evidence of it was admissible. *Henry v. Bassett*, 89.

3. Abbreviations appearing in a written instrument may be explained by parol evidence. *The First National Bank of Springfield v. Fricke*, 178.

4. IN CRIMINAL CASES: ABSENT WITNESSES: CONTINUANCE. The statute which enables the prosecution to force the accused to trial notwithstanding the absence of a witness, by admitting that if present the witness would testify as stated in the application of the accused for a continuance, is not a violation of the constitutional guaranty that the accused shall have compulsory process for his witnesses, but it goes to the very verge of the constitution and must not be so construed as to permit a distinction to be taken between such testimony and the testimony of witnesses present. The intention is, that the statutory testimony shall be entitled to the same weight as if the witness was present at the trial. *The State v. Underwood*, 230.

5. EVIDENCE OF OTHER OFFENSES. While it is true as a general rule that on the trial of one accused of a crime evidence of other crimes committed by him is inadmissible, yet where the testimony relates to a conversation of the accused wherein he admits the commission of the offense charged and also another crime, it is proper to give in evidence the whole conversation. *Ib.*

6. Upon a trial for murder, defendant claiming to have acted in self-defense, offered evidence that shortly before the homicide other persons accused of crime had been taken from the hands of officers of the law and hung by a mob, but the evidence did not implicate the deceased, and it was excluded. *Held*, no error. *Ib*

7. RAPE: EVIDENCE. In a prosecution for rape, the prosecuting witness was asked by defendant's counsel what her object was in going to Scott's station, (where the rape was alleged to have been committed,) but the court refused to permit her to answer. *Held*, error. *The State v. Hartnett*, 251.

8. PRESUMPTION OF DEED. A deed will not be presumed where there is a chain of title apparently perfect, and upon which the possessor appears to have relied to sustain his possession.
Thus, where plaintiff in ejectment at the trial in 1877 offered in

evidence deeds constituting a complete chain of title, including a deed from one L. dated in 1817, and in addition showed possession in himself and those under whom he claimed from 1841 or 1842 down to 1872, and defendant, in rebuttal, showed an outstanding title in one G. under a conveyance from L. dated in 1808; *Held*, that there was no ground to presume a re-conveyance from G. to L. between 1808 and 1817. *Dunn v. Miller*, 260.

9. Evidence of declarations and of acts of the wife is competent to show that the intention of the parties was that the wife should hold lands conveyed to her by her husband for him; and the finding of the jury as to the fact is conclusive. *Seibold v. Chrisman*, 308.

10. PRACTICE: HARMLESS ERROR IN ADMITTING EVIDENCE. Where undisputed evidence fixed the amount of recovery at a sum greater than that for which plaintiff obtained judgment, *Held*, that error committed in admitting evidence of a further amount was no ground for reversal. *The State ex rel. Lafayette County v. O'Gorman*, 370.

11. PAROL EVIDENCE TO EXPLAIN AMBIGUOUS INSTRUMENT. Where a bond appearing on its face to be the obligation of a corporation leaves it doubtful what corporation is intended, parol evidence will be received to explain the ambiguity. *Franklin Ave. German Savings Inst. v. Board of Education of the Town of Roscoe*, 408.

12. CONTRACTS: PAROL EVIDENCE. A contract in writing which is complete and perfect in itself and not ambiguous in its terms, will be held to supersede a prior written contract in relation to the same subject matter; and parol evidence will not be admitted to show that such was not the intention of the parties. *Chrisman v. Hodges*, 413.

13. ABSENT WITNESS: CONTINUANCE. The statute which enables the prosecution to force the accused to trial notwithstanding the absence of a witness, by admitting that if present the witness would testify as stated in the application of the accused for a continuance, (R. S. 1879, § 1886,) can only be invoked by the State after the accused, by exercising reasonable diligence, shall have unsuccessfully employed the power of the court to secure the personal presence of such of his witnesses as may be within the reach of its process. It does not apply to a case where a subpœna has been seasonably issued, but for want of time has not been returned. *The State v. Hickman*, 416.

14. ——: IMPEACHING EVIDENCE. In a criminal case, when the prosecution, in order to avoid a continuance, has admitted that an absent witness if present would give testimony as stated in defendant's application for a continuance, evidence will not be received, by way of impeaching such testimony, that the witness has made a contradictory statement. *Ib.*

15. EVIDENCE: STATEMENT OF CONFEDERATE. Statements made by one jointly indicted with the defendant, long after the commission of the alleged offense, and not in the presence of the defendant, are not admissible against him. *Ib.*

16. ——: ——: PRINCIPAL AND AGENT. A druggist will be held criminally liable for the act of his clerk committed in his absence

in selling liquor in violation of law, unless he shows that the sale was made without his assent. *The State v. Reiley*, 521.

17. DEMURRER TO EVIDENCE. In passing upon a demurrer to evidence, the court is required to make every inference of fact in favor of the party offering the evidence, which a jury might, with any degree of propriety, make in his favor; and if when viewed in this light it is insufficient to support a verdict in his favor, the demurrer should be sustained. But the court is not at liberty, in passing on the demurrer, to make inferences of fact in favor of the defendant, to countervail or overthrow either presumptions of law or inferences of fact in favor of plaintiff. That would clearly be usurping the province of the jury. *Frick v. The St. Louis, Kansas City & Northern Railway Company*, 595.

18. POSSESSION AS NOTICE OF CLAIM. Possession may in some cases be evidence of a claim; but when a particular claim is notorious and is sufficient to account for a possession, no one is called on to speculate as to the existence of some other claim. *Lincoln v. Thompson*, 613

19. MARRIED WOMAN SIGNING A NOTE, WITHOUT SEPARATE ESTATE: BURDEN OF PROOF. The signature of a married woman to a note already issued, adds nothing to the note, does not change the legal liability of the parties already bound, and, therefore, does not constitute an alteration, of which one of them may take advantage when the signature has been obtained without his consent—unless the married woman has a separate estate; and the burden of proving that she has such separate estate rests upon the person asserting that the signature constitutes an alteration. *Williams v. Jensen*, 681.

IN ACTIONS FOR NEGLECT OF STATUTORY DUTY. See Goodwin v. The Chicago, Rock Island & Pacific Railroad Company, 73.

PAROL EVIDENCE TO EXPLAIN A RECEIPT. See Carpenter v. Jamison, 285.

EVIDENCE OF NEGLIGENCE. See Schneider v. The Missouri Pacific Railway Company, 295.

BREAKING JAIL, AS EVIDENCE OF GUILT. See The State v. Mallon, 355.

EXECUTION.

1. IN UNLAWFUL DETAINER: PROPER PARTY. Where the plaintiff in an action of unlawful detainer dies leaving a judgment for possession and damages unsatisfied as to the damages, execution properly issues in the name of the administrator, not of the heir. *Sims' Administrator v. Kelsay*, 68.

2. RELEASE OF LEVY. The holder of negotiable paper having recovered judgment thereon against the maker and caused execution to be levied on property of the maker sufficient to pay the debt, afterward released the levy. *Held*, that he thereby released from liability one who was holden on the paper as accommodation indorser. *Priest v. Watson*, 310.

3. SHERIFF'S POWER TO RE-SELL. To authorize a sheriff to re-sell land struck off at execution sale, it is essential that the purchaser shall have refused to pay the amount of his bid. Simple neglect to pay is not always tantamount to refusal. Unless he either positively refuses, or does some act which amounts to a repudiation of his obligation to pay, the sheriff, before making a re-sale, should not only demand the purchase money, but also tender a deed. R. S. 1879, § 2384. *Phillips v. Goldman*, 686.

ESTATES IN REMAINDER: THEIR LIABILITY. See White v. McPheeters, 286

FALSE PRETENSES.

1. OBTAINING A NOTE FROM THE MAKER. It is an offense indictable under section 1561, Revised Statutes 1879, to procure the making and delivery of a promissory note by false pretenses, and this without regard to the value of the note, or whether it is negotiable or not. A note is a "valuable thing" within the meaning of that section. An indictment would also probably lie under section 1335; but the punishment authorized by that section is only what could be inflicted for the larceny of the paper on which the note is written. *The State v. Porter*, 171.

2. ——: PLEADING, CRIMINAL. While an indictment under section 1561 for obtaining the signature of the maker to a promissory note by means of a trick or false pretense or false and fraudulent representation, by the express provision of that section is good without stating of what the trick consisted or what the pretense or fraudulent representation was, it must not be in the alternative or disjunctive, but must allege that the signature was obtained by one of the means specified, or if by more than one it must allege those relied upon conjunctively. It is better pleading, however, to state of what the trick consisted or what the pretense or fraudulent representation was. *Ib.*

FEES.

SHERIFF'S FEES: LIABILITY OF ASSIGNEE OF JUDGMENT FOR THEM. Where land was levied on, sufficient in value to satisfy the execution, and afterward the judgment was assigned, and by order of the assignee the levy was released and the execution returned unsatisfied, and afterward the judgment was satisfied, but the consideration was paid direct to the assignee; *Held*, that the case fell within the last clause of section 13, page 625, Wagner's Statutes, and the assignee was bound to pay the sheriff his half commissions, as therein allowed. *Gates v. Buck*, 688.

OF COUNTY CLERKS. See The State ex rel. Lafayette County v. O'Gorman, 370.

FORCIBLE ENTRY AND DETAINER.

1. UNLAWFUL DETAINER: NO ALLOWANCE FOR IMPROVEMENTS. The law

does not authorize the allowance of compensation for improvements in the action of unlawful detainer, and the court has no power to entertain a petition for such allowance, even by consent of parties. *Sims' Administrator v. Kelsay*, 68.

2. ——: ——: EXECUTION. After a judgment for plaintiff in unlawful detainer, defendant filed a supplemental petition praying allowance of improvements, whereupon the court ordered a stay of execution, with leave to plaintiff to answer the petition before the next term. At the next term, instead of answering the petition the plaintiff moved for execution, and the court granted the motion. *Held*, that there was no error in this, 1st, because the order for a stay was void. 2nd, because it had expired when the execution was ordered. *Ib.*

3. ——: EXECUTION: PROPER PARTY. Where the plaintiff in an action of unlawful detainer dies leaving a judgment for possession and damages unsatisfied as to the damages, execution properly issues in the name of the administrator, not of the heir. *Ib.*

FORFEITURE.

CAIRO & FULTON LAND GRANT, NOT FORFEITED. See The St. Louis, Iron Mountain & Southern Railway Company v. McGee, 522.

FORFEITURE FOR BREACH OF CONDITION BROKEN. See Baker v. The City of St. Louis, 671.

FORGERY.

An indictment for forgery of a promissory note, describing the note as payable to J. M. Willard, is not sustained by evidence that defendant forged a note payable to J. C. Willard. The variance in the name is fatal. *The State v. Chamberlain*, 382.

FRAUD.

1. BY STOCKHOLDERS. Courts will be sedulous in their endeavors to defeat all schemes and contrivances whereby parties may seek to receive and enjoy the benefits and privileges incident to the position of a stockholder and at the same time to be exonerated from the burdens imposed by law. *Fisher v. Seligman*, 13.

2. CONTRACT: DISAFFIRMANCE FOR FRAUD. The right to disaffirm a contract for fraud, must be exercised promptly, and the disaffirmance must be *in toto*. *Estes v. Reynolds*, 563.

FRAUDULENT CONVEYANCES.

1. A voluntary conveyance by an insolvent debtor is fraudulent as against creditors, though no fraud was in fact intended. *White v. McPheeters*, 286.

2. FRAUDULENT CONVEYANCE: ACTION TO SET ASIDE: LIMITATION. So long as the right to have execution upon a judgment continues, the plaintiff may maintain an action to have the judgment declared a lien on land fraudulently conveyed by the defendant. To maintain such action it is not necessary that the land shall first have been sold under execution. The creditor may, however, if he chooses, pursue that course. *Zoll v. Soper*, 460.

3. ——: ——: JURISDICTION. The fact that the fraudulent debtor is dead does not make such an action cognizable in the probate court. His estate has no interest in the matter. The circuit court is the proper forum. *Ib.*

4. ——: ——: INTEREST. A decree establishing the lien of a judgment creditor upon land fraudulently conveyed by his debtor, properly allows interest upon the original judgment from its date, at the rate therein specified. *Ib.*

5. FRAUDULENT CONVEYANCE: STATUTE OF LIMITATIONS. As to a creditor who seeks to impeach a deed made by his debtor conveying real estate to a third person in fraud of his creditors, the statute of limitations begins to run from the time the fraudulent deed is recorded, or from the time the creditor has actual notice of the conveyance, whichever first occurs. *Hughes v. Littrell*, 573.

GAMBLING.

THE GAMBLING ACT OF 1881: CONSTITUTIONALITY OF. The State ex rel. Harris v. Laughlin, 358.

GARNISHMENT.

PLEADING AND PRACTICE. In garnishment proceedings the plaintiff's denial of the garnishee's answer to interrogatories stands in the place of a petition, and its sufficiency is to be tested by the same rules, both in respect to pleading and practice. If the garnishee demur to the denial for misjoinder of several matters in one count, and after the demurrer is overruled, answers over, he will be held to have waived the defect. *The Union Bank of Trenton v. Dillon*, 380

GUARDIAN AND WARD.

1. WRONGFUL INVESTMENT OF WARD'S FUNDS: HUSBAND AND WIFE. A curatrix married, and her husband became curator in her stead, having agreed before the marriage, for a valuable consideration, to pay what she owed her wards. She had invested some of the wards' money without any order of court and had loaned some of it to him. He died and she again became curatrix. In a proceeding by her against his estate to recover these amounts;

Held, that the investment in land being unauthorized was a *devastavit*, for which he became liable by virtue of his agreement; that without such agreement he would have been liable by operation of law; that this latter liability would have ceased with his

death unless there was judgment in his lifetime, but the contract liability did not cease.

Held, also, that the estate was liable for the borrowed money if deceased failed to repay it, or if he repaid it before the marriage and the curatrix failed to account for it, or if he repaid it after becoming curator.

Held, also, that notwithstanding her double relation to the case, plaintiff had the same right to enforce the liabilities of the estate that any other curator would have had. *West v. West's Administrator*, 204.

2. EFFECT OF ANNUAL SETTLEMENT. Annual settlements of administrators, curators, etc., have not, like final settlements, the force and effect of judgments, but are *prima facie* evidence only of the correctness of the account stated, and are open to collateral attack. *Ib.*

HANNIBAL (CITY OF).

CITY TAXES IN: LIEN FOR AND COLLECTION OF THEM. See The State ex rel. Van Brown v. Van Every, 530.

HEIR.

ADMINISTRATOR, PROPER PARTY TO EXECUTION, WHEN. Where the plaintiff in an action of unlawful detainer dies leaving a judgment for possession and damages unsatisfied as to the damages, execution properly issues in the name of the administrator, not of the heir. *Sims' Administrator v. Kelsay*, 68.

ANCESTOR'S PLEADINGS, NOT BINDING ON HEIRS. See Davis v. Smith, 219.

HOMESTEAD.

1. Defendant, with the purpose of making it his homestead, acquired title to a tract of land by deed recorded before plaintiff's debt was contracted. After the debt was contracted, defendant sold a homestead which was exempt from execution, and with the proceeds erected a dwelling house on the land and used it as a homestead. *Held*, that as against the plaintiff's debt the new homestead was not exempt from execution. Wag. Stat., pp. 698, 699, §§ 7, 8. *Stanley v. Baker*, 60.

2. A homestead right acquired by the head of a family is not lost by the death of his wife or the removal of his children, if he continues to reside on the place. *Beckmann v. Meyer*, 333.

3. A homestead may be sold and another acquired with the proceeds, and the premises sold pass to the vendee discharged of judgment debts of the vendor. *Ib.*

4. The visible occupancy of the premises as the head of a family, under a recorded title, fixes the character of the property as a homestead. *Ib.*

5. ESTOPPEL: ATTORNMENT. The fact that A., the vendee of homestead property which was afterward sold under execution against the vendor, recognized the validity of the latter sale so far as to attorn to the purchaser at the sheriff's sale, does not estop him from asserting his rights by a proceeding to set aside the sheriff's deed. *Ib.*

6. The right of homestead ceases to exist when the occupant, with a view to acquiring a residence else where and with no fixed purpose of returning, ceases to occupy the premises as a residence. Intention to return, in order to preserve the right, must be formed at the time of removal; in order to restore it when once lost, must be executed by actual resumption of occupancy. *Smith v. Bunn*, 559.

7. CASE ADJUDGED. S. having lost his wife broke up housekeeping, moved his household goods, leased his farm and went elsewhere to live. Several years afterward he re-married and within three weeks died. At the time of his death he was preparing to return to his former home, but had not done so, the tenant being still in possession. *Held*, that his widow was not entitled to homestead. *Ib.*

HORSE-RACING.

An indictment for running a horse-race in a public road, will be supported by proof that defendant procured another to ride his horse in the race. R. S. 1879, § 1531. *The State v. Wagster*, 107.

HUSBAND AND WIFE.

1. MARRIED WOMAN'S DEED: ACKNOWLEDGMENT. The officer's certificate of acknowledgment to a married woman's deed is *prima facie* evidence that it was voluntarily executed. *Clark v. Edwards' Administrator*, 87.

2. MARRIED WOMAN'S OBLIGATION: ITS GENERAL NATURE. It is well settled in this State that if a married woman executes a note and nothing to the contrary is expressed, the creditor may by a proceeding in equity have it satisfied out of her separate property. But it is not a lien, or, strictly speaking, a charge upon the property, nor does it bind her personally. It simply constitutes a foundation for a proceeding in equity by which her separate property, but no other, may be subjected to its payment. *Davis v. Smith*, 219.

3. ———: ADMINISTRATION. The obligation of a married woman, even though she had a separate property when she contracted it, cannot after her death, be proved against her estate in the ordinary way. The circuit court alone can adjudicate such a demand. *Ib.*

4. ———: EFFECT OF HER DEATH. While the death of a married woman does not extinguish the right of a creditor to satisfaction of an obligation incurred by her while *covert*, out of what was her separate property, neither does it give him a right to satisfaction out of any other of her property. This is subject to the debts of her general creditors, if she have any, while they, equally with the special cred-

itors, have a right to resort to whatever was her separate property for payment of their demands. *Ib.*

5. MARRIED WOMAN'S SEPARATE ESTATE: EVIDENCE. In determining whether a deed vests a separate estate in a married woman or not, the court is not limited to a construction of the deed itself. Resort may be had to the marriage contract if there be one; and if that deprives the husband of his marital right in her property, she will be deemed to take a separate estate *Klenke v. Koeltze*, 239.

6. MARRIAGE CONTRACT. A marriage contract is binding between the parties and their legal representatives, although not acknowledged or proved and recorded. *Ib.*

7. MARRIED WOMAN'S DEBTS: RIGHTS OF HER CREDITORS. The obligation of a married woman, who has a separate estate when it is incurred, is not a lien or charge upon the property, until the creditor obtains a decree against it. After her death or that of her husband, her creditors on demands existing against her before marriage have an equal right to satisfaction of their demands out of what was her separate property with creditors who have no claim against her personally, but only demands which they may enforce against her separate property, while the latter class of creditors have no right whatever to satisfaction of their demands out of her general property. Marriage suspends the rights of her creditors, then existing, to sue her alone and proceed against her separate or general property, but the dissolution of the marriage by the death of either husband or wife revives the right of her general creditors against her and her property. *Ib.*

8. CURTESY IN WIFE'S SEPARATE ESTATE. A conveyance to the sole and separate use of a married woman does not debar her husband from curtesy in lands of which she died in the actual possession, or the rents, issues and profits of which she received through her trustee, unless it appears from the deed that such result was intended by the grantor. A covenant on the part of the trustee to convey the property at her death as she may appoint, and in default of appointment then to her heirs; *Held*, not to indicate such intent. *Tremmel v. Kleiboldt*, 255.

9. CONVEYANCE OF WIFE'S REAL ESTATE. Prior to the 22nd of June, 1821, there was no law in the State or Territory of Missouri that authorized the wife or the husband, or both of them together, to convey the wife's real estate during the marriage. *Dunn v. Miller*, 260.

10. MARRIED WOMEN: SEPARATE ESTATE. It is settled law that a married woman possessed of a separate estate may bind it by giving her promissory note. *The Boatmen's Savings Bank v. Collins*, 280.

11. ——: ——. The words ordinarily used to create a separate estate are "to her sole and separate use;" but these are not essential. Any words clearly indicating the intention will suffice. The words: "To have and to hold * * unto the said S. L. B., her heirs, assigns and legal representatives, in fee simple absolute and in severalty forever," do not create such estate. *Ib.*

12. ——— : PROMISSORY NOTE. The promissory note of a married woman not possessed of a separate estate at the time she executed it, is a nullity. *Ib.*

13. CONVEYANCE BY MISTAKE: TRUSTS. If a husband having an estate in remainder in his wife's lands, without intending to convey his interest, join her in executing a deed in fee, a trust will arise in his favor which can be enforced against the grantee at the suit of the husband's creditors. *White v. McPheeters*, 286.

14. TRUSTS. When a husband purchases real estate with his own money and causes the conveyance to be made to his wife, there is no presumption of a resulting trust, but *prima facie* this is a provision for the wife. *Seibold v. Christman*, 308.

15. ——— : EVIDENCE. Evidence of declarations and of acts of the wife is competent to show that the intention of the parties was that the wife should hold for the husband; and the finding of the jury as to the fact is conclusive. *Ib.*

16. MARRIED WOMAN SIGNING A NOTE, WITHOUT SEPARATE ESTATE: BURDEN OF PROOF. The signature of a married woman to a note already issued, adds nothing to the note, does not change the legal liability of the parties already bound, and, therefore, does not constitute an alteration, of which one of them may take advantage when the signature has been obtained without his consent—unless the married woman has a separate estate; and the burden of proving that she has such separate estate rests upon the person asserting that the signature constitutes an alteration. *Williams v. Jensen*, 681.

17. CONSIDERATION, WHAT IS A SUFFICIENT: SURETY: RELEASE BY EXTENSION OF TIME. A consideration may be good in law though it be of no value to the party to whom it moves. If it be a damage or inconvenience to the other party, that will be sufficient. Thus, where the holder of a promissory note agreed with the maker to extend the time of payment provided he would get A. (a married woman) to sign the note; *Held*, that the procurement of A.'s signature (though for want of a separate estate it was of no legal effect), was a sufficient consideration for the extension, and that a surety, without whose consent the signature had been obtained, was thereby discharged. *Ib.*

LIABILITY AS BETWEEN THEMSELVES FOR WARD'S ESTATE, WHERE BOTH IN TURN HAVE BEEN CURATOR. See West v. West's Administrator, 204.

WIFE, AS WITNESS FOR HER HUSBAND. See Wheeler & Wilson Manufacturing Company v. Tinsley, 458.

IMPROVEMENTS.

NO ALLOWANCE FOR, IN UNLAWFUL DETAINER. See Sims' Administrator v. Kelsay, 68.

INFANCY.

1. PARENT AND CHILD: CONTRACT OF HIRING: MEASURE OF DAMAGES. If a minor son hire himself out without the knowledge of his father, the father may either adopt the contract and claim whatever is due under it, or he may repudiate it and claim the value of his son's services. In the latter event, if it appears that the employer has permitted the son to use a part of his time for his own purposes, the measure of recovery will be the value of his entire time, less the value of the privilege so accorded to him. *Sherlock v. Kimmell*, 77.

2. ——: ——: ——. If a father hire out his minor son for an indefinite period, the employer may discharge the son at any time without notice to the father. *Ib.*

3. ——: ——: EVIDENCE. In an action by a father to recover wages due his minor son, statements made by the son are not admissible as evidence against the father. *Ib.*

4. MUNICIPAL CORPORATION: DEFECTIVE STREETS. A city cannot escape liability for injuries sustained by a boy in one of its public streets through its negligence, by showing that the boy was playing in the street and not traveling on it. *Donoho v. The Vulcan Iron Works*, 401.

5. CONTRIBUTORY NEGLIGENCE. The youth and lack of discretion of an infant plaintiff are matters to be considered by the jury in determining the question of contributory negligence. *Ib.*

6. INJURIES TO CHILDREN PLAYING ON TURN-TABLE. It is negligence on the part of a railroad company to omit to secure its turn-tables so that children cannot revolve them. If a child is injured in consequence of such an omission, the company will be liable, and the fact that the turn-table was being revolved by other children at the time will make no difference. *Nagel v. The Missouri Pacific Railway Company*, 653.

7. ACTION FOR PERSONAL INJURIES: VERDICT. To authorize a verdict for substantial damages in an action by a parent for the negligent killing of his infant child, it is not necessary to make proof of the amount of damages sustained. The jury may infer this from all the facts in evidence. *Ib.*

NEGLIGENT INJURY TO INFANT CHILD. See Frick v. The St. Louis, Kansas City & Northern Railway Company, 542.

INJUNCTION.

Township bonds issued in aid of railroads being void, as heretofore decided by this court, a levy of taxes to pay them may be prevented by injunction. *Hays v. Dowis* 250.

INSTRUCTIONS.

1. Instructions which wholly ignore an essential issue in the case are properly refused. *Henry v. Bassett*, 89.

2. BURGLARY: INSTRUCTIONS. Where the evidence given in a prosecution for burglary made it impossible for the jury not to conclude that the window through which defendant effected an entrance was an outside window; *Held*, that it was not essential for the trial court specially to instruct the jury that they could not convict unless they found this fact. *The State v. Butterfield*, 297.

3. In a criminal case it is a matter of discretion with the trial court whether to permit the jury to take the instructions with them to the jury room or not. *Ib.*

4. Instructions are properly refused, however correctly they may declare the law, when there is no evidence tending to prove the facts upon which they are predicated. *Bowen v. The Hannibal & St. Joseph Railroad Company*, 426.

5. An instruction containing simply an abstract principle of law, having no practical bearing on the case, is properly refused. *Bonine v. The City of Richmond*, 437.

6. Instructions offered by the parties but amended by the court before being given, are to be considered as if given by the court of its own motion, and the fact that counsel read them to the jury will not operate a waiver of exceptions duly taken to the action of the court. *Swigert v. The Hannibal & St Joseph Railroad Company*, 475.

7. Error of the trial court in stating in the instructions legal conclusions from facts submitted to the jury, will not entitle the appellant to a reversal if the jury are properly directed what verdict to render in case they find such facts. *Sparling v. Conway*, 510.

IN ACTIONS FOR NEGLIGENT INJURIES. See Goodwin v. The Chicago, Rock Island & Pacific Railroad Company, 73.

INSURANCE.

1. INSURANCE COMPANIES CAN NOT MAKE ASSIGNMENTS. An insurance company can not, even with the consent of the stockholders make a valid voluntary assignment of its property, and thus withdraw itself and its property from the control of the Insurance Department of the State, after it has violated the laws made for the regulation of insurance companies. Such an assignment would be in fraud of those laws. Before suit is brought by the Superintendent of the Insurance Department, under the statute, an insurance company whose capital stock is impaired may make itself sound; but while it attempts to do business upon an unsound basis, it is acting in fraud of the law; and while it fails to repair the deficiency, the interests of the policy-holders and the public are, by the law, intrusted to the court of equity under provisions created for the case, and the jurisdiction of the court cannot be ousted at the will of the offender. The State is a party to the proceeding, and a full exposure of frauds, if any exist, is essential to the purposes of the State in enacting the law. *Williams v. The Commercial Insurance Company*, 388.

2. ———. The legal results of fraud upon the law cannot be indirectly

avoided. Though the law relates only to "insurance companies doing business in this State," a company, having violated and acted in fraud of the law while doing business in this State, cannot avoid its penalties by making an assignment, or by ceasing to take new risks, or by any other subterfuge resorted to for the purpose of evading the provisions of the statute for exposure and punishment. *Ib.*

JUDGMENT.

1. A suit will not lie to set aside or correct errors in a judgment obtained without fraud, or to procure a re-taxation of costs. *McGindley v. Newton*, 115.

2. JUDGMENT AGAINST PRINCIPAL BINDING ON SURETIES. Where a county clerk and the sureties in his official bond, being sued by the county for a surplus of fees alleged to be withheld from the treasury, defended on the ground that he had made and the county court had approved a statement and settlement of his accounts, and that by such settlement it appeared there was no surplus; *Held*, that a judgment of the circuit court setting aside such settlement as having been obtained by fraud was admissible in evidence, and was binding upon the clerk and his sureties alike. *The State ex rel. Lafayette County v. O'Gorman*, 370.

3. An order of court was in these words: "Now at this day this cause is compromised and settled as per stipulation now filed, each party to pay his costs," *Held*, that, though neither formal nor full, this was a judgment of like binding force on the parties as any other judgment. *Black v Hughes*, 441.

4. One of the parties to a judgment rendered upon a compromise denied its validity on the ground that the compromise had been made by his attorney in violation of instructions. It appeared, however, that he became aware of all the facts the same day that the judgment was entered, but permitted the term to elapse without taking any step to set it aside. *Held*, that it was conclusive upon him. *Ib.*

5. RES JUDICATA. A construction of a contract once fixed by a decree of court, is *res judicata* between the parties to the decree. *Buchanan v. Smith*, 463.

6. Defendant was required by a decree of court to surrender to plaintiff certain notes. He surrendered them, but not until he had first collected and appropriated to his own use a portion of each. *Held*, that this was not a compliance with the decree, and that plaintiff was entitled to maintain an action for the amount so appropriated. *Ib.*

RIGHTS OF JUDGMENT CREDITORS. See Fisher v. Seligman, 13.

NO RES JUDICATA. See Broadwell v. Kansas City, 213.

JUDICIAL NOTICE.

MUNICIPAL CHARTERS: JUDICIAL NOTICE. The courts do not take judicial notice of acts of municipal incorporation except where they are declared to be public statutes. *The Inhabitants of the Town of Butler v. Robinson*, 192.

OF POPULATION OF A CITY. See The State ex rel. Harris v. Herrmann, 340.

JURISDICTION.

1. TO SETTLE ACCOUNTS OF PUBLIC OFFICERS. Failure of an officer to comply with a law requiring him to settle his accounts with the county court, will give the circuit court jurisdiction in an action brought on his official bond, to investigate his accounts and make the settlement. *The State ex rel. Lafayette County v. O'Gorman*, 370.

2. TO SET ASIDE FRAUDULENT CONVEYANCE. The fact that the fraudulent debtor is dead does not make such an action cognizable in the probate court. His estate has no interest in the matter. The circuit court is the proper forum. *Zoll v. Soper*, 460.

3. The circuit and not the probate court has jurisdiction of actions on administrators' bonds. *The State ex rel. Longdon v. Shelby*, 482.

JUSTICES' COURTS.

1. PLEADING. Plaintiff may state his cause of action in two counts as well in a justice's court as in the circuit court. *Lincoln v. The St. Louis, Iron Mountain & Southern Railway Company*, 27.

2. RAILROAD: LABORER'S LIEN. The statute does not confer upon justices of the peace jurisdiction of suits to enforce liens for labor done upon a railroad. *Cranston v. The Union Trust Company*, 29.

3. NOTICE OF APPEAL. The rule, that when an appeal is taken from a justice of the peace after the judgment day, the case will not be triable at the return term of the appellate court, unless the appellant gives notice of the appeal ten days at least before that term, or the appellee enters his appearance on or before the second day of the term, "it may be conceded, is waived or dispensed with, by the fact, that the appellant gives, and the appellee accepts notice, in writing, to take depositions, and the depositions are accordingly taken—both parties being present—and afterwards filed in the cause, before the return term; and by the further fact that the appellee, on the third day of the return term, took out subpœnas for witnesses; so far, at least, as to make the case *triable*, at the return term; but such facts, do not authorize an *affirmance* of the justice's judgment, *at the return term*, as for a *failure* to prosecute the appeal." *Berry v. The Union Trust Company*, 430.

PLEADING IN. See Belcher v. The Missouri Pacific Railway Company, 514.

LANDS AND LAND TITLES.

1. PRE-EMPTION OF PUBLIC LANDS: ASSIGNMENT OF THE RIGHT. A. settled upon land, but was refused permission to enter the same. His right of entry being judicially determined in his favor after his death, his heirs consummated the pre-emption right, entered the land, and a patent was issued to them in 1866, whereupon they conveyed to B.; but they had previously, in 1862, conveyed to C. *Held*, that the conveyance executed prior to the entry and patent was valid as against that made subsequent thereto. *Coleman v. Allen*, 332.

2. ——: ——. A pre-emption claim on lands not declared public, although contingent, is a fixed fact, awaiting such action of the government as will ripen the conditional into a positive right; and the pre-emptor, though he acquires no right against the government, is protected from intrusion by others, and his interest in the land is assignable. *Ib.*

3. ——: ——. The act of Congress of September 4th, 1841, (U. S. Stat., 456, § 12,) which declares all assignments of the rights thereby secured null and void, does not refer to the possession or the right of possession, to the title or to the land itself, but simply to the right to be preferred over all others as a purchaser from the government at an established price, and the limitation upon alienation in that act has no application to the rights secured to the heirs of a deceased settler under the act of March 3rd, 1843. *Ib.*

LANDLORD AND TENANT.

1. PARTITION SALE: PURCHASER'S RIGHT TO RENTS. A purchaser at partition sale is entitled to possession of the land from the day of sale; or if it be subject to a valid lease or a lease which he might but does not choose to avoid, he will be entitled to the rents from that day; and if the owners have collected them in advance, and that was not known to him when he bought, he will be entitled to a rebate upon his bid to an equal amount. *Winfrey v. Work*, 55.

2. ACTUAL OCCUPATION, HOW FAR NOTICE. Actual occupation by a tenant imparts notice of the tenancy and the term, but not of the fact that rent has been paid in advance. *Ib.*

3. MORTGAGEE IN POSSESSION: HIS LIABILITY FOR RENTS, ETC. If a mortgagee enter into possession and then permits the mortgageor to take the profits or to use the mortgage to keep off other creditors, he will be required to account, at the suit of the latter for the rents and profits for the time he is in possession. In the absence of fraud or neglect of duty he will be required to account for only such as are actually received. *Ely v. Turpin*, 83.

4. TRUSTEE FOR BENEFIT OF CREDITORS: BOUND TO COLLECT RENTS. If a trustee for the benefit of creditors permits the debtor to take the rents and profits of the trust land, he will be held personally liable for their value, less taxes and the cost of repairs and necessary improvements, but without rests. *Ib.*

5. ASSIGNEE FOR BENEFIT OF CREDITORS: HIS LIABILITY FOR RENTS: PRACTICE. An assignee who, in the conduct of the business of his trust, continues in possession of premises let to his assignor, does not thereby subject himself to a personal liability for the rent. To create such liability there must be a special agreement. And when the assignee is sued personally, the fact that he may nave assets as assignee will not authorize recovery. *White v. Thomas*, 454.

LARCENY.

1. Stealing in a dwelling house is made grand larceny by statute, irrespective of the value of the property stolen. R. S. 1879, § 1309. *The State v. Butterfield*, 297.

2. Recent possession of the property stolen, unless satisfactorily explained, is *prima facie* evidence of guilt. *Ib.*

3. Stealing from a dwelling house is grand larceny, regardless of the value of the property stolen. *The State v. Brown*, 317.

4. RECENT POSSESSION OF THE PROPERTY. Where a prisoner indicted for larceny, upon the trial offered no evidence of good character; *Held*, that an instruction which told the jury to convict unless his recent possession of the stolen property was *explained* by the evidence, was correct. HOUGH and HENRY, JJ., dissent. *Ib.*

5. RECENT POSSESSION OF STOLEN PROPERTY: PRESUMPTION OF GUILT: GOOD CHARACTER. The possession of property soon after it is stolen, if not explained or accounted for, is presumptive evidence of guilt, but it is not necessarily conclusive where there is evidence of good character; and an instruction is too narrow which does not submit to the jury the evidence of good character in connection with that of recent possession. *The State v. Crank*, 406.

LIMITATIONS.

1. PROMISSORY NOTE. A plea that a note is barred by the statute of limitations will be no defense to an action by the holder of the note against a party who has agreed with the maker to pay it. *Amonett v. Montague*, 43.

2. IN CASE OF NON-SUIT. The statute which provides that a party who suffers a non-suit in an action commenced within the time prescribed by the statute of limitations, shall have the right to commence a new action within one year, applies as well to voluntary as to involuntary non-suits. R. S. 1879, § 3239. *The State ex rel. Lafayette County v. O'Gorman*, 370.

3. Where an act of Congress operates a grant *in praesenti*, the statute of limitations begins to run in favor of an occupant and against one claiming under the act, from thedate of the former's entry. *The St. Louis, Iron Mountain & Southern Railway Company v. McGee*, 522.

4. The running of the statute of limitations as against one claiming under the above act of 1853 was not suspended by the enactment of section 7, page 746, General Statutes, Missouri, 1865. *Ib.*

5. FRAUDULENT CONVEYANCES: STATUTE OF LIMITATIONS. As to a creditor who seeks to impeach a deed made by his debtor conveying real estate to a third person in fraud of his creditors, the statute of limitations begins to run from the time the fraudulent deed is recorded, or from the time the creditor has actual notice of the conveyance, whichever first occurs. *Hughes v. Littrell*, 573.

6. A plea of limitations should always refer to the commencement or to the proceedings supposed to be barred, not to any subsequent date. *Lincoln v. Thompson*, 613.

MALICIOUS PROSECUTION.

1. MALICIOUS PROSECUTION. A corporation is liable to an action for malicious prosecution instituted by its authority. *Gillett v. Mo. Valley R. R. Co.*, 55 Mo. 315, overruled. *Boogher v. The Life Association of America*, 319.

2 PLEADING—GENERAL DENIAL. In an action for malicious prosecution the defendant, under the general denial, may prove that he acted in good faith upon the advice of competent counsel. *Sparling v. Conway*, 510.

3. EVIDENCE. In such an action, defendant will be allowed to show by his own testimony that from his knowledge of the case, and upon the advice of counsel, he really believed that plaintiff was guilty of the crime for which he was prosecuted. *Ib.*

4. MALICE: PROBABLE CAUSE. Evidence that a prosecution was begun and carried on in good faith and in consequence of the advice of competent counsel upon all the facts in the prosecutor's knowledge and all which he might by reasonable diligence have learned, is competent to rebut the presumption of malice arising from the want of probable cause; but it does not tend to establish the existence of probable cause, and is not admissible on that ground. *Ib.*

MANDAMUS.

1 MANDAMUS TO INFERIOR COURTS: JURISDICTION. Where an inferior court having determined that it had no jurisdiction and that another tribunal had exclusive jurisdiction, for that reason declined to proceed to a final disposition of a criminal case, and ordered it transferred to the other tribunal for that purpose; *Held*, that this court would, upon an application for a mandamus to compel the inferior court to proceed, inquire into the question of jurisdiction, and if it found the jurisdiction to exist would issue the writ. *The State ex rel. Harris v. Laughlin*, 358.

2. TO COMPEL A CITY TO LEVY TAXES TO PAY JUDGMENTS. Under the statute authorizing the courts whenever an execution against a city has been returned unsatisfied for want of property whereon to levy, to

issue a writ of *mandamus* to the proper officers of the city to levy, assess and collect a special tax to pay the execution, it is not necessary in an application for the writ to allege a demand upon the officers and their refusal to levy the tax. No formal petition is necessary. It is sufficient to exhibit to the court the execution and the return of *nulla bona* thereon, and then ask for the alternative writ. Wag. Stat., 617, § 77. *The State ex rel. Cassidy v. Slavens*, 508.

3. ———: CHANGE OF VENUE: COSTS. Upon such an application motions for change of venue and security for costs will not be allowed. *Ib.*

MARRIED WOMAN.

See Husband and Wife.

MASTER AND SERVANT.

CONTRACT FOR HIRE OF INFANT: MEASURE OF DAMAGES: EVIDENCE. See Sherlock v. Kimmell, 77.

MISTAKE.

CONVEYANCE BY MISTAKE: TRUSTS. If a husband having an estate in remainder in his wife's lands, without intending to convey his interest, join her in executing a deed in fee, a trust will arise in his favor which can be enforced against the grantee at the suit of the husband's creditors. *White v. McPheeters*, 286.

MUNICIPAL CORPORATION.

1. TRESPASS BY CITY OFFICERS. If a city officer takes earth from private property and uses it in improving a street of the city without any provision in the charter or elsewhere authorizing such a proceeding, it is a trespass, for which the officer will be individually liable, but not the city. *Rowland v. The City of Gallatin*, 134.

2. MEAT-SHOP LICENSE: UNIFORMITY OF TAXATION. A license fee imposed upon the keepers of meat-shops is a tax, and must be uniform within the territorial limits of the authority imposing it. Const. 1875, art. 10, § 3. A city ordinance, therefore, which requires a license fee of $100 in one part of the city and $25 in the rest, is void. *The City of St. Louis v. Spiegel*, 145.

3. PLEADING: JEOFAILS: MUNICIPAL CORPORATION. In an action by a town to recover the cost of a sidewalk laid down by the town in front of certain lots, the statement failed to allege that the lots were within the corporate limits, and that defendant was the owner of them. *Held*, that these were fatal and incurable omissions. *The Inhabitants of the Town of Butler v. Robinson*, 192.

4. MUNICIPAL CHARTERS: JUDICIAL NOTICE. The courts do not take judicial notice of acts of municipal incorporation except where they are declared to be public statutes. *Ib.*

5. MUNICIPAL TAXES. Municipal corporations have no power to grant exemption from or commutation of taxes, and a contract which undertakes to do so is void. *The State v. The Hannibal & St. Joseph Railroad Company*, 208.

6. LIABILITY FOR DAMAGES. If earth used in grading a street under a contract with the city be permitted to roll down upon the premises of an adjoining proprietor, to his damage, the city will be liable. *Broadwell v. The City of Kansas*, 213.

7. CONSTITUTIONAL LAW. Injury so done is a taking of private property within the meaning of the provision of the constitution which forbids the taking of private property without just compensation. *Ib.*

8. JUDGMENT. It is no defense to a suit brought by the adjoining proprietor to recover for such an injury, to show that judgment has been rendered against him on a special tax-bill issued to the contractor. His claim being for unliquidated damages could not be pleaded in answer to that suit. *Ib.*

9. CITY MARSHAL: POWER TO ARREST. A city marshal has no authority to make arrests for an offense not committed in his presence without a warrant. R. S. 1879, § 4998. *The State v. Underwood*, 230.

10. MUNICIPAL CORPORATION: DEFECTIVE STREETS. A city cannot escape liability for injuries sustained by a boy in one of its public streets through its negligence, by showing that the boy was playing in the street and not traveling on it. *Donoho v. The Vulcan Iron Works*, 401.

11. MUNICIPAL CORPORATIONS: THEIR LIABILITY FOR DEFECTIVE SIDEWALKS. To fix upon a municipal corporation liability for an injury occasioned by a defect in a street, it is not essential to show that the corporate authorities had actual knowledge of the defect. It is enough if a state of circumstances existed from which notice could have been reasonably implied. But without one or the other of these there is no liability. *Bonine v. The City of Richmond*, 437.

12. CITY SIDEWALKS: QUESTION OF LAW. Whether it is the duty of a city under its charter to keep its sidewalks in repair, is a question of law, and should not be submitted to the jury. *Ib.*

13. MUNICIPAL TAXATION. Section 11, article 10 of the constitution of 1875, operates a limitation upon the power of the general assembly to authorize cities and incorporated towns to levy taxes, but of its own force, confers no power to levy them. *The State ex rel. Van Brown v. Van Every*, 530.

14. STREETS: PARTITION OF ABUTTING LANDS: RIGHTS OF PARTITIONERS IN STREET. Where the grantors have made partition of the ground bounded on one side by the dedicated street, the deeds carry the fee, subject to the easement, to the center of the street, and each grantee takes in severalty a reversionary right in so much of the street as pertains to the lot acquired by him in partition, which he may assert against the city. *Baker v. The City of St. Louis*, 671.

15. COVENANT TO MAINTAIN A MARKET. A covenant in a conveyance of realty to a city for a street and market house, that the lot shall revert and the grantee re-convey when the ground ceases to be used for a market, runs with the land, the grantors retain the fee subject to the easement, and abandonment gives a right of re-entry. *Ib*

MANDAMUS AGAINST MUNICIPAL CORPORATION, TO COMPEL LEVY OF TVXES. See The State ex rel. Cassidy v. Slavens, 508.

MURDER.

1. MURDER. Instructions are erroneous, which authorize the jury to convict of murder in the first degree without requiring them to find both malice and deliberation; and the error is not cured by the giving of an instruction which correctly defines the offense. *The State v. Pacquett*, 330.

2. MURDER IN THE SECOND DEGREE. When the circumstances of deliberation and malice are not proved, the law will only presume a homicide to be murder in the second degree. *The State v. Eaton*, 586.

3. DELIBERATION. An instruction that "deliberation" means "in a cool state of the blood, that is, not in a state of mental excitement, caused by lawful provocation;" *Held*, error. See *State v. Curtis*, 70 Mo. 594. *Ib.*

4. SELF-DEFENSE. To justify a homicide on the ground of self-defense, it is sufficient to show an apparent danger affording a reasonable ground for apprehension on the part of the slayer that unless he kill or disable his adversary, his own life or limbs are in imminent peril. *Ib.*

5. THREATS. One whose life has been threatened is not bound to wait, before he begins to defend himself, for personal violence or an assault made upon him. On the other hand, he has no right to hunt up the threatener and slay him, or to take his life at all unless the threatener, when they meet, by his conduct manifests a purpose to carry the threat into execution. *Ib.*

NEGLIGENCE.

1. INSTRUCTIONS. In a common law action for a negligent injury, the court should instruct the jury what facts, if found, will amount to negligence, and not leave them to determine that for themselves. *Goodwin v. The Chicago, Rock Island & Pacific Railroad Company*, 73.

2. CONTRIBUTORY NEGLIGENCE. Where concurring negligence of the plaintiff proximately contributes to produce the injury complained of, there can be no recovery, unless the injury is also the direct result of the omission of defendant, after becoming aware of the danger to which the plaintiff is exposed, to use proper care to avoid injuring him. *Straus v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 185.

3. PLEADING NEGLIGENCE. In an action for negligence the petition need not specify the particular act complained of. If it does, no other can be proved. But a general averment of negligence will be sufficient. *Schneider v. The Missouri Pacific Railway Company*, 295.

4. CONTRIBUTORY NEGLIGENCE. The youth and lack of discretion of an infant plaintiff are matters to be considered by the jury in determining the question of contributory negligence. *Donoho v. The Vulcan Iron Works*, 401.

5. CONTRIBUTORY NEGLIGENCE. Instructions so drawn as to put upon the plaintiff the onus of showing that he was not guilty of contributory negligence are properly refused. *Swigert v. The Hannibal & St. Joseph Railroad Company*, 475.

6. ———: DEFENDANT'S LIABILITY. The negligent acts of a defendant which will subject him to liability notwithstanding the contributory negligence of the plaintiff are such as are committed after he becomes aware of the danger to which plaintiff has exposed himself. *Ib.*

7. INSTRUCTIONS AS TO NEGLIGENCE. In an action grounded upon negligence, the better practice is for the court, by appropriate instructions applicable to the facts in evidence in the case, to tell the jury whether these facts, if they find them to exist, do or do not constitute negligence. An instruction is erroneous which leaves the whole question of negligence to the jury without any qualification whatever. *Yarnall v. The St. Louis, Kansas City & Northern Railway Company*, 575.

8. PLAINTIFF'S CONTRIBUTORY NEGLIGENCE: DEFENDANT'S NEGLIGENCE. When the plaintiff is guilty of contributory negligence, the defendant will be liable only for such negligence on his part as occurred after he became aware of plaintiff's exposed condition. *Ib.*

9. NEGLIGENCE: WHEN A QUESTION FOR THE JURY. The rule is that whether a person injured by the negligence of another was exercising ordinary care, is a question to be determined by the jury, either where the facts are disputed, or where there is a dispute or reasonable doubt as to the inferences to be drawn from undisputed facts. *Nagel v. The Missouri Pacific Railway Company*, 653.

10. ———. If an injury received through the negligence of the defendant be the immediate cause of the death of the injured person, the fact that he was unskillfully treated and that this contributed to his death will be no defense to an action by the next of kin. *Ib.*

IN OPERATING RAILROADS. See Goodwin v. The Chicago, Rock Island & Pacific Railroad Company, 73; Straus v. The Kansas City, St. Joseph & Council Bluffs Railroad Company, 185.

IN CROSSING RAILROADS. See Kelley v. The Hannibal & St. Joseph Railroad Company, 138.

IN ALIGHTING FROM MOVING TRAIN. See Straus v. The Kansas City, St. Joseph & Council Bluffs Railroad Company, 185.

NEGLIGENT INJURY TO INFANT CHILD. See Frick v. The St. Louis, Kansas City & Northern Railway Company, 542.

——— BY LEAVING TURN-TABLE UNGUARDED. See Nagel v. The Missouri Pacific Railway Company, 653.

NOTARY PUBLIC.

NOTARIES ACT OF 1881. See The State ex rel. Harris v. Herrmann, 340.

NOTICE.

1. POSSESSION AS NOTICE OF CLAIM. Possession may in some cases be evidence of a claim; but when a particular claim is notorious and is sufficient to account for a possession, no one is called on to speculate as to the existence of some other claim. *Lincoln v. Thompson*, 613.

2. SHERIFF'S DEED: ACKNOWLEDGMENT. As against a purchaser for value and without notice of an execution sale, a sheriff's deed made in pursuance of the sale but not acknowledged till thirteen years afterward, will not be allowed to take effect as of the time of the sale. *Ib.*

PURCHASE WITH NOTICE. See Wilson v. Milligan, 41.

ACTUAL OCCUPATION, AS NOTICE OF TENANCY. See Winfrey v. Work, 55.

——— AS NOTICE OF CLAIM. See Lincoln v. Thompson, 613.

NUISANCE.

1. LIABILITY OF SUCCESSOR IN INTEREST. A purchaser of land, while not liable for damages caused by the erection of a nuisance on the land before his purchase, is liable for those caused by its continuance after the purchase and after he has knowledge of it; but he is not liable for either the erection or continuance of a nuisance created by his vendor before the sale, on adjoining land. *Wayland v. The St. Louis, Kansas City & Northern Railway Company*, 548.

2. CASE ADJUDGED. A railroad company, for the purpose of draining a lake into an adjacent river, connected the two by a ditch dug for the most part on its right of way, but where it emptied into the river on land of another. When the water in the river was high, it ran through the ditch into the lake and flooded the adjoining country. If no part of the ditch had been dug, except so much as was outside the right of way, the same thing would have happened. If no part had been dug except what was on the right of way, it would not have contributed to the overflow. The company which dug the ditch sold its right of way and other property to another company, and after the sale the lands of an adjoining proprietor were damaged by an overflow from the river. In an action against the latter company to recover the damage; *Held*, that it was not liable. *Ib.*

OATH.

WAIVER OF. See Grant v. Holmes, 109.

OFFICERS.

DE FACTO BOARD OF EDUCATION: LIABILITY ON SCHOOL BONDS. A board of education which has long acted and been recognized as a legal body, cannot avoid liability on bonds issued on behalf of its school district, by showing that the district was not legally organized. *Franklin Are. German Savings Inst. v. Board of Education of the Town of Roscoe*, 408.

THEIR BONDS: SETTLEMENT OF THEIR ACCOUNTS. See The State ex rel. Lafayette County v. O'Gorman, 370.

PARENT AND CHILD.

1. CONTRACT OF HIRING OF INFANT CHILD: MEASURE OF DAMAGES. If a minor son hire himself out without the knowledge of his father, the father may either adopt the contract and claim whatever is due under it, or he may repudiate it and claim the value of his son's services. In the latter event, if it appears that the employer has permitted the son to use a part of his time for his own purposes, the measure of recovery will be the value of his entire time, less the value of the privilege so accorded to him. *Sherlock v. Kimmell*, 77.

2. ——: ——: ——. If a father hire out his minor son for an indefinite period, the employer may discharge the son at any time without notice to the father. *Ib.*

3. ——: ——: EVIDENCE. In an action by a father to recover wages due his minor son, statements made by the son are not admissible as evidence against the father. *Ib.*

4. INFANT CHILD WANDERING FROM HOME: NEGLIGENCE. A child two years of age, without the knowledge of its parents, escaped from its home and strayed upon a railroad track where it was injured. It did not appear how it got upon the track, or that it was ever known to have been there before, or that its absence had been discovered when the accident occurred. Its father was a butcher, and at the time was at his shop in another part of the city. Its mother, besides the care of her household duties, in which she had no help, had charge of an infant about one month old. *Held*, that under these circumstances the father could not, as a matter of law, be held chargeable with negligence in permitting the escape of the child. *Frick v. The St. Louis, Kansas City & Northern Railway Company*, 542.

5. MEASURE OF DAMAGES. A father whose child has been injured through the negligence of another, is entitled to recover, as damages, an amount which will fully compensate him for the loss of service and care of the child, and the expense resulting from the injury for a period not extending beyond the minority of the child, including surgical attention, care, nursing and the like. *Ib.*

6. INJURIES TO INFANT CHILD: DAMAGES TO PARENT. To authorize a verdict for substantial damages in an action by a parent for the negligent killing of his infant child, it is not necessary to make proof of the amount of damages sustained. The jury may infer this from all the facts in evidence. *Nagel v. The Missouri Pacific Railway Company*, 653.

PARTIES.

PROPER PARTY IN CASE OF ASSIGNMENT. Where a demand had been allowed against an estate and in favor of a trustee for several persons, and afterward two of these persons assigned their interests, *Held*, that the assignee became the real party in interest, and an action against the administrator on his bond for non-payment of the assigned demand was properly brought in the name of the State upon his relation and to his use. *The State ex rel. Longdon v. Shelby*, 482.

TO EXECUTION. See Sims' Administrator v. Kelsay, 68.

TO SUIT ON A NOTE. See Smith v. Gregory, 121.

PARTITION.

1. PARTITION SALE: PURCHASER'S RIGHT TO RENTS. A purchaser at partition sale is entitled to possession of the land from the day of sale; or if it be subject to a valid lease or a lease which he might but does not choose to avoid, he will be entitled to the rents from that day; and if the owners have collected them in advance, and that was not known to him when he bought, he will be entitled to a rebate upon his bid to an equal amount. *Winfrey v. Work*, 55.

2. STREETS: PARTITION OF ABUTTING LANDS: RIGHTS OF PARTITIONERS IN STREET. Where the grantors have made partition of the ground bounded on one side by the dedicated street, the deeds carry the fee, subject to the easement, to the center of the street, and each grantee takes in severalty a reversionary right in so much of the street as pertains to the lot acquired by him in partition, which he may assert against the city. *Baker v. The City of St. Louis*, 671.

PARTNERSHIP.

1. LIABILITY OF MEMBERS ON PARTNERSHIP STOCK. Where a partnership owns stock in an insolvent corporation, a member of the firm will be liable to an execution against himself individually, as a stockholder, upon the motion of a creditor of the corporation, in all cases where the firm would be subject to such liability. *Bray's Administrator v. Seligman's Administrator*, 31.

2. A creditor of a firm may release one member of the firm without discharging the others. *Grant v. Holmes*, 109.

JOINT UNDERTAKING OF ATTORNEYS TO DEFEND A SUIT, A PARTNERSHIP. See Henry v. Bassett, 89.

PERSONAL INJURIES.

SEE INFANCY.

NEGLIGENCE.

RAILROADS.

PETROLEUM.

INSPECTION OF PETROLEUM. It is not an offense within the purview of section 5843, Revised Statutes 1879, to sell petroleum oil for consumption beyond the limits of the State, without first having it inspected. *The State ex rel. Spencer v. White*, 465.

PLEADING.

1. IN JUSTICES' COURTS. Plaintiff may state his cause of action in two counts as well in a justice's court as in the circuit court. *Lincoln v. The St. Louis, Iron Mountain & Southern Railway Company*, 27.

2. COUNTER-CLAIM. It is no defense to a suit brought by a proprietor to recover for an injury done to his property in the grading of a street, to show that judgment has been rendered against him on a special tax-bill issued to the contractor. His claim being for unliquidated damages could not be pleaded in answer to that suit. *Broadwell v. The City of Kansas*, 213.

3 DAMAGES: ACTION. The various forms or subjects of injury sustained from a single wrongful act, do not multiply the causes of action. *Stickford v. The City of St. Louis*, 309.

4. ——: PLEADING. In an action of damages against a municipal corporation for an injury to property caused by a change of grade of a street, when the plaintiff owns the fee of one lot, and a leasehold with rent of the adjoining lot, he may sue in one count for the damage to both. *Ib.*

5. ESTOPPEL. Facts relied upon as an estoppel *in pais* must be specially pleaded; otherwise evidence of them cannot be received. *Bray v. Marshall*, 327.

6. NEW MATTER. In an action on a bond given by an agent for the faithful performance of his duties the petition alleged, as breaches of the bond, that the agent had failed to account truly as to the subject matter of his agency. At the trial evidence was offered by defendants tending to show that a full adjustment of all matters relating to the agency had been had and the agent had paid a portion of the balance found against him in money and had given his note for the remainder. *Held*, that this evidence tended to show that there had been no breach; that the facts, therefore, did not constitute new matter within the meaning of the code, and so might be given in evidence without being specially pleaded. *Wheeler & Wilson Manufacturing Company v. Tinsley*. 458.

7. PLEADING—GENERAL DENIAL. In an action for malicious prosecution the defendant, under the general denial, may prove that he acted in good faith upon the advice of competent counsel. *Sparling v. Conway*, 510.

8. LIMITATIONS. A plea of limitations should always refer to the commencement or to the proceedings supposed to be barred, not to any subsequent date. *Lincoln v. Thompson*, 613.

PLEADING IN ACTIONS FOR NEGLECT OF STATUTORY DUTY. See Goodwin v. The Chicago, Rock Island & Pacific Railroad Company, 73.

———. IN ACTIONS AGAINST RAILROADS FOR KILLING STOCK. See Lincoln v. The St. Louis, Iron Mountain & Southern Railway Company, 27; Scott v. The St. Louis, Iron Mountain & Southern Railway Company, 136; Lynn v. The Chicago, Rock Island v. Pacific Railroad Company, 167; Schneider v. The Missouri Pacific Railway Company, 295; Bowen v. The Hannibal & St. Joseph Railroad Company, 426; Belcher v. The Missouri Pacific Railway Company, 514.

ANCESTOR'S PLEADINGS, NOT BINDING ON HEIRS. See Davis v. Smith, 219.

PLEADING NEGLIGENCE. See Schneider v. The Missouri Pacific Railway Company, 295.

PLEADING, CRIMINAL.

1. CRIMINAL STATUTES: DISJUNCTIVE: CONJUNCTIVE. When a statute uses the disjunctive in enumerating offenses, it is competent in an indictment to aver their commission conjunctively. *The State v. Nations*, 53.

2. SURPLUSAGE IN INDICTMENT. An indictment will not be held defective, if, after striking out the objectionable and immaterial portions as surplusage, enough still remains to constitute a valid and substantial indictment. *Ib.*

3. MURDER: CLERICAL ERROR IN INDICTMENT. An indictment for murder charged that defendant wounded deceased on the 30th of August, and that in consequence thereof deceased languished "until the 1st of September, on which day of *August* in the same year he died." *Held*, that the insertion of the word August, where it last appears was manifestly a clerical error, and not a sufficient ground for arresting the judgment. *The State v. Eaton*, 586.

INDICTMENT FOR FALSE PRETENSES. See The State v. Porter, 171.

PRACTICE.

1. ESTOPPEL BY ACTS IN COURT. A party who has tried his case upon a theory involving the tacit concession of a particular fact, will not be permitted in the appellate court to obtain a reversal of the judgment against him upon a theory involving a denial of that fact. *Bray's Administrator v. Seligman's Administrator*, 31.

2. ———. The plaintiff will not be allowed to recover upon a theory of the case directly adverse to that upon which the petition plainly proceeds and the case has been tried; and this although there is a fact alleged in the petition and proven by the evidence which, under other circumstances, might authorize recovery on the adverse theory. *Stix v. Matthews*, 96.

3. TEMPORARY JUDGE. When a temporary judge, selected by the parties, by their consent has tried a cause without being sworn, neither of them will afterward be heard to urge this as an objection to the validity of the judgment. *Grant v. Holmes*, 109.

4. CHANGE OF VENUE: RULE OF COURT. A rule of court which makes a change of venue case non-triable unless the transcript is filed at least fifteen days before the term, is in conflict with section 1870, Revised Statutes 1879, and void. *The State v. Underwood*, 230.

5. ESTOPPEL BY ACTS IN COURT: REVIVAL OF SUIT: PROPER PARTY. If an action be revived against an executor alone, without objection on his part, he will not be heard after judgment and appeal to this court, for the first time to insist that the devisees ought to have been made parties, especially when it does not appear that there are devisees other than the executor himself. *Klenke v. Koeltze*, 239.

6. BILL OF EXCEPTIONS. To authorize the filing of a bill of exceptions in vacation there must be both consent of parties and an order of court permitting it. The one without the other will not be sufficient. *McCarty v. Cunningham*, 279.

7. Error committed in withdrawing evidence from the jury is not cured by giving an instruction which permits them, in making up their verdict, to consider the facts which the excluded evidence tended to prove. *The State v. Mallon*, 355.

8. LIMITATIONS: NON-SUIT. The statute which provides that a party who suffers a non-suit in an action commenced within the time prescribed by the statute of limitations, shall have the right to commence a new action within one year, applies as well to voluntary as to involuntary non-suits. R. S. 1879, § 3239. *The State ex rel. Lafayette County v. O'Gorman*, 370.

9. GARNISHMENT: PLEADING AND PRACTICE. In garnishment proceedings the plaintiff's denial of the garnishee's answer to interrogatories stands in the place of a petition, and its sufficiency is to be tested by the same rules, both in respect to pleading and practice. If the garnishee demur to the denial for misjoinder of several matters in one count, and after the demurrer is overruled, answers over, he will be held to have waived the defect. *The Union Bank of Trenton v. Dillon*, 380.

10. INSTRUCTIONS. No issues should be submitted by the instructions but such as are made by the pleadings. *Wade v. Hardy*, 394.

11. ACTION ON ADMINISTRATOR'S BOND: AMENDMENT. Where a party aggrieved by the acts of an administrator sues upon his bond in his own name, it is proper for the court to permit him to correct the

error by substituting the State as nominal plaintiff. *The State ex rel. Longdon v. Shelby*, 482.

12. REMANDING WITH SPECIAL DIRECTIONS: COSTS. When a case has been remanded by this court with directions to the trial court to enter judgment against the plaintiff, his right to dismiss upon payment of costs is at an end; and if he obtains a dismissal in vacation it will be the duty of the trial court to re-instate the case upon the docket and enter the judgment as ordered. *The State ex rel. Dixon v. Giran*, 516.

13. JUDGMENT FOR POSSESSION IN EQUITY. Judgment for possession may follow the final ascertainment of a party's title as against his adversary in possession in a proceeding in equity. *Baker v. The City of St. Louis*, 671.

14. DEFECTS CURED BY VERDICT. If a material matter is not expressly averred in the pleadings, but is necessarily implied from what is stated therein, the defect is cured by verdict in favor of the party so pleading. If the defendant in such a case pleads to the merits, he thereby waives the objection to mere formal defects, and will not be heard on the trial to object that the petition does not state a cause of action. Such objection can only be interposed when the petition altogether fails to state any cause of action, not where one is defectively stated. *Grove v. The City of Kansas*, 672.

15. INSTRUCTIONS. Under the circumstances of the present case, the objection that the jury did not take the instructions with them to their room, came too late when made for the first time by motion for new trial. *Ib.*

PRACTICE IN ATTACHMENT: ORDER OF PUBLICATION. See Bray v. Marshall, 327.

A VERDICT HELD INFORMAL, BUT SUFFICIENT IN SUBSTANCE. See Rembaugh v. Phipps, 422.

PRACTICE, CRIMINAL.

1. THE ACCUSED AS A WITNESS. Under the present statute, (R. S. 1879, § 1918,) a defendant in a criminal case offering himself as a witness in his own behalf, can be cross-examined only as to matters of which he testified in chief. *The State v. Porter*, 171.

2. BURGLARY: INSTRUCTIONS. Where the evidence given in a prosecution for burglary made it impossible for the jury not to conclude that the window through which defendant effected an entrance was an outside window; *Held*, that it was not essential for the trial court specially to instruct the jury that they could not convict unless they found this fact. *The State v. Butterfield*, 297.

3. BURGLARY AND LARCENY: VERDICT. A verdict in a prosecution for burglary and larceny declared defendants "guilty in manner and form as charged in the indictment," and assessed the punishment, but failed to say of which offense the defendants were found guilty. *Held*, that it was nevertheless good. *Ib.*

4. INSTRUCTIONS. On the trial of a criminal case, the court gave an instruction for defendant which was erroneous and in conflict with a correct instruction given for the State. The error was in favor of the defendant. *Held*, that it afforded no ground for reversal. *Ib.*

5. ———. In a criminal case it is a matter of discretion with the trial court whether to permit the jury to take the instructions with them to the jury room or not. *Ib.*

6. ———: WITNESS. The contumacy of a witness in persisting in answering a question after the court has ruled it out, furnishes no ground for reversal when the court has expressly instructed the jury to disregard the answer. *Ib.*

7. PRESUMPTION OF REGULARITY. In the absence of evidence to the contrary, it is always presumed that the proceedings of a court of general jurisdiction have been taken in conformity to law. Hence, where the record in a criminal case showed that the jury were permitted to separate pending the trial, but did not show affirmatively that this was without the defendant's consent; *Held*, that there was no ground for reversing the judgment. *The State v. Brown*, 317.

8. ———. When the evidence is not preserved in the bill of exceptions, this court will assume that it warranted the instructions given by the court and the verdict found by the jury. *Ib.*

9. ———. Where the evidence adduced upon the trial is not preserved in the bill of exceptions this court will assume that it warranted the instructions given, if such evidence could legitimately have been given under the indictment. *The State v. Mallon*, 355.

10. REPUGNANCE. An indictment in two counts will be good if each count contains a criminal charge sufficiently alleged, though the counts be repugnant to each other. *Ib.*

11. Error committed in withdrawing evidence from the jury is not cured by giving an instruction which permits them, in making up their verdict, to consider the facts which the excluded evidence tended to prove. *Ib.*

12. Remarks of the prosecuting attorney; *Held*, not to call for a reversal. *Ib.*

13. BURGLARY AND LARCENY: INDICTMENT IN ONE COUNT: AUTERFOIS ACQUIT. Where a defendant indicted for burglary and larceny in one count, as permitted by the statute, is acquitted of one and convicted of the other, the acquittal is conclusive upon that branch of the charge. If the conviction be afterward set aside, a new trial will be ordered only upon the other branch. R. S. 1879, § 1301. *The State v Bruffey*, 389.

14. PROSECUTION OF MISDEMEANORS. A conviction for a misdemeanor upon an affidavit filed by a private person alone, and without an

information of the prosecuting attorney, is illegal and void. Sess. Acts 1877, p. 355, § 6. *The State v. Huddleston*, 667.

PRACTICE IN SUPREME COURT.

1. Allegations contained in a motion unsupported by evidence, cannot be received on appeal as true. *Sims' Administrator v. Kelsay*, 68.

2. REMITTITUR: COSTS. A judgment for an amount greater than that claimed in the petition, is bad: but the error may be cured by remittitur in this court. This, however, will throw the costs of the appeal upon the respondent. *Higgs v. Hunt*, 106.

3. INSTRUCTIONS. Where the facts are undisputed and their legal effect only is in question, this court may review the decision of the lower court though no instructions were given or refused. *Henry v. Bell*, 194.

4. A matter once expressly decided by this court cannot on a second appeal be again brought in question. It is *res judicata*. *Adair County v. Ownby*, 282.

5. REMANDING WITH SPECIFIC DIRECTIONS. When an intermediate appellate court remands a case with specific directions, and no appeal is taken from this judgment, and the trial court conforms its action to the judgment, upon a second appeal the Supreme Court will hold the judgment conclusive. *Lackland v. Smith*, 307.

6. This case having been re-tried in accordance with the rules laid down by this court on a former appeal, and no new points being involved in the present appeal, the judgment is affirmed. *Conroy v. The Vulcan Iron Works*, 651.

7. REVERSING ON THE WEIGHT OF EVIDENCE. When there is any evidence to support the verdict of the jury, or when the evidence is conflicting, the settled rule of this court is not to reverse a case upon the mere weight of evidence. *Grove v. The City of Kansas*, 672.

IN PROCEEDINGS TO OPEN ROADS. See Anderson v. The Township Board of Myrtle Township, 57.

PRESUMPTIONS.

PRESUMPTION OF SETTLEMENT OF DEMANDS. Where it was conceded by the pleadings that the consideration of a note given upon a settlement between the plaintiff's intestate and defendant, was services rendered by the intestate; *Held*, that this rebutted the presumption which would otherwise have arisen that the settlement embraced all the demands between the parties. *Wade v. Hardy*, 394.

OF A DEED. See Dunn v. Miller, 260.

THAT COURT PROCEEDINGS ARE REGULAR. See The State v. Brown, 317.

OF GUILT, ARISING FROM RECENT POSSESSION OF STOLEN PROPERTY. See The State v. Butterfield, 297; The State v. Brown, 317; The State v. Crank, 405.

PRINCIPAL AND AGENT.

1. IMPLIED POWER OF AGENT. An agent to sell has no implied power to bind his principal by an agreement to pay another commissions for making sales. *Atlee v. Fink*, 100.

2. SECRET CONTRACT OF AGENT WITH ADVERSE PARTY. A dealer in lumber agreed to pay to a builder, who was employed to superintend the erection of buildings for others, and whose duty it was to pass upon accounts presented for materials furnished, but not to make purchases, a commission on all sales of lumber made to the builder's employers through his influence. This agreement was not made known to the employers. *Held*, that it was against public policy and void. *Ib.*

3. RATIFICATION BY A CORPORATION of the unauthorized act of its agent is equivalent to previous authorization. It need not be manifested by a vote or formal resolution, or be authenticated by the seal of the corporation. It will be inferred from failure promptly to disavow the act when it comes to the knowledge of the corporation. *The First National Bank of Springfield v. Fricke*, 178.

4. IMPLIED POWERS OF RAILROAD PHYSICIAN. The fact that a physician in the service of a railroad company is authorized to buy medicines on the credit of the company, does not imply a power to bind the company by a contract for board, lodging, attendance and nursing of a person injured on the company's road. See *Brown v. M., K. & T. R. R. Co.*, 67 Mo. 122. *Mayberry v. The Chicago, Rock Island & Pacific Railroad Company*, 492.

5. PRINCIPAL'S CRIMINAL LIABILITY. A druggist will be held criminally liable for the act of his clerk committed in his absence in selling liquor in violation of law, unless he shows that the sale was made without his assent. *The State v. Reiley*, 521.

PRINCIPAL AND SURETY.

1. A CASE IN WHICH THE RELATION DID NOT EXIST. In the absence of a special agreement, the legal liability of the parties to a promissory note is to be determined by the relation they bear to the note, and the fact that one of them was the principal debtor and the others signed for his accommodation, will not change this rule or make the latter co-sureties as to each other. Hence, where one of two accommodation signers executed a note as joint maker with the principal debtor and the other as payee and indorser, and there was no special agreement between them; *Held*, that the former could not, after paying the note, call upon the latter for contribution. *Hillegas v. Stephenson*, 118.

2. BANK OFFICER'S BOND: ADDITIONAL EMPLOYMENT: SURETIES' LIABILITY. The fact that the bookkeeper of a bank performs the duties of teller also, will not relieve the sureties in his bond given for the faithful performance of his duties as bookkeeper, from liability for errors committed by him in that capacity, unless the errors were in some way connected with some improper act on his part as teller, or were superinduced by his employment as such. *The Home Savings Bank v. Traube*, 199.

3. CONSIDERATION, WHAT IS A SUFFICIENT: SURETY: RELEASE BY EXTENSION OF TIME. A consideration may be good in law though it be of no value to the party to whom it moves. If it be a damage or inconvenience to the other party, that will be sufficient. Thus, where the holder of a promissory note agreed with the maker to extend the time of payment provided he would get A. (a married woman) to sign the note; *Held*, that the procurement of A.'s signature (though for want of a separate estate it was of no legal effect), was a sufficient consideration for the extension, and that a surety, without whose consent the signature had been obtained, was thereby discharged. *Williams v. Jensen*, 681.

JUDGMENT AGAINST PRINCIPAL, BINDING ON SURETY. See The State ex rel. Lafayette County v. O'Gorman, 370.

PROMISSORY NOTES.

1. NEGOTIABILITY OF NOTES MADE IN INDIANA. By the law of Indiana, such notes only are negotiable as are made payable at a bank in that state; and the name of the bank must be correctly stated in the note. This rule will be enforced in an action brought in this State upon a note executed in Indiana. Where, therefore, in an action brought upon such a note to charge the assignor as indorser, it appeared that there was no such bank as that named in the note; *Held*, that the action could not be maintained. *Stix v. Matthews*, 96.

2. PROTEST. A notary's certificate of protest of a note payable at a bank is defective if it fails to show presentment to some officer or person at the bank and demand of payment made of him. *Ib.*

3. PROTEST: EVIDENCE. Where in an action brought upon several promissory notes to charge the defendant as indorser, the evidence as to one of the notes failed to show that payment was ever demanded of the maker, and as to the rest showed that they were non-negotiable. *Held*, that proof of waiver of notice of protest was irrelevant, and it was no error to exclude it. *Ib.*

4. LIABILITY OF THE PARTIES, HOW DETERMINED. In the absence of a special agreement, the legal liability of the parties to a promissory note is to be determined by the relation they bear to the note, and the fact that one of them was the principal debtor and the others signed for his accommodation, will not change this rule or make the latter co-sureties as to each other. Hence, where one of two accommodation signers executed a note as joint maker with the principal debtor and the other as payee and indorser, and there was no special agreement between them; *Held*, that the former could not, after paying the note, call upon the latter for contribution. *Hillegas v. Stephenson*, 118.

5. The fact that the same person is both co-maker and co-payee in a note, if he assign his interest to the other payee, will not prevent the latter from maintaining an action on the note alone. *Smith v. Gregory*, 121.

6. ADMINISTRATION: PROMISSORY NOTE. If one of the administrators of an estate, upon final settlement, accounts in money for the full amount of a note belonging to the estate, and the settlement is accepted and the administrators discharged, the note, by operation of law, becomes his private property. *Ib.*

7. If one of two payees in a note assign his interest in the note to his co-payee, the latter will be entitled to maintain an action upon it in his own name. *Ib.*

8. The judgment of the court below enjoining a sale under a deed of trust is affirmed, on the ground that the note which the deed of trust was given to secure, was without consideration. *Ryan v. Gilliam*, 132.

9. NEGOTIABLE PAPER: RELEASE OF MAKER: EFFECT ON ACCOMMODATION INDORSER: EXECUTION. The holder of negotiable paper having recovered judgment thereon against the maker and caused execution to be levied on property of the maker sufficient to pay the debt, afterward released the levy. *Held*, that he thereby released from liability one who was holden on the paper as accommodation indorser. *Priest v. Watson*, 310.

10. The indorsement without recourse of a note secured by deed of trust, carries with it the trust deed as a security. *Bell v. Simpson*, 485.

11. LIABILITY UPON INDORSEMENT MADE AFTER DEATH OF MAKER. The indorser of a negotiable promissory note, who becomes such after the maturity of the note, and after the death of the maker, and with knowledge of the death, will be held to his liability as indorser, without demand, protest or notice, if the holder in due time procures the allowance of the note by the probate court against the estate of the maker. *Picklar v. Harlan*, 678.

WHEN NOT BARRED BY LIMITATION. See Amonett v. Montague, 43.

FALSE PRETENSES IN OBTAINING PROMISSORY NOTE. See The State v. Porter, 171.

ALTERATION OF A NOTE. See First National Bank of Springfield v. Fricke, 178.

MARRIED WOMAN'S NOTE. See Boatmen's Savings Bank v. Collins, 280.

CONSIDERATION OF A NOTE. See Bell v. Simpson, 485.

ALTERATION OF A NOTE, BY MARRIED WOMAN'S SIGNING. See Williams v. Jensen, 681.

QUESTIONS OF LAW AND FACT.

1. NEGLIGENCE: INSTRUCTIONS. In a common law action for a negligent injury, the court should instruct the jury what facts, if found, will amount to negligence, and not leave them to determine that for themselves. *Goodwin v. The Chicago, Rock Island & Pacific Railroad Company*, 73.

2. ABANDONMENT OF CONTRACT: A QUESTION OF LAW. What constitutes abandonment of a contract is a matter of law, and the court should instruct the jury as to the effect of the facts they may find, bearing upon the question, and not leave it to them to say, without such instruction, whether a contract has been abandoned or not. *Henry v. Bassett*, 89.

3. EJECTMENT: PLAINTIFF'S TITLE. In ejectment it is error for the court to leave it to the jury to determine whether the plaintiff is the owner of the premises, without instructing them as to the legal effect of the deeds read in evidence. *Hunt v. The Missouri Pacific Railway Company*, 252.

4. Instructions which leave it to the jury to determine what facts constitute adverse possession or color of title, are properly refused. *Boogher v. Neece*, 383.

5. CITY SIDEWALKS: QUESTION OF LAW. Whether it is the duty of a city under its charter to keep its sidewalks in repair, is a question of law, and should not be submitted to the jury. *Bonine v. The City of Richmond*, 437.

6. INSTRUCTIONS AS TO NEGLIGENCE. In an action grounded upon negligence, the better practice is for the court, by appropriate instructions applicable to the facts in evidence in the case, to tell the jury whether these facts, if they find them to exist, do or do not constitute negligence. An instruction is erroneous which leaves the whole question of negligence to the jury without any qualification whatever. *Yarnall v. The St. Louis, Kansas City & Northern Railway Company*, 575.

PROPER RATE OF SPEED FOR RAILROAD TRAINS, WHEN A QUESTION FOR THE JURY. See Frick v. The St. Louis, Kansas City & Northern Railway Company, 595.

NEGLIGENCE, A QUESTION FOR THE JURY, WHEN. See Nagel v. The Missouri Pacific Railway Company, 653.

RAILROADS.

1. PUBLIC CROSSINGS: STATUTES CONSTRUED. Under the act of 1875, (Sess. Acts, p. 130,) it is the duty of a railroad company to construct a proper crossing wherever its road crosses a public highway without being notified to do so by any officer in charge of the highway. The notice provided for in the act is but a mode of securing the crossing in the event of failure of the company to construct it.

The act is not intended solely for the protection of travelers upon the highway. The owner of an animal injured in consequence of

failure of the company to comply with its provisions may avail himself of them. *Lincoln v. The St. Louis, Iron Mountain & Southern Railway Company.* 27.

2. LABORER'S LIEN: JUSTICES' COURTS. The statute does not confer upon justices of the peace jurisdiction of suits to enforce liens for labor done upon a railroad. *Cranston v. The Union Trust Company,* 29.

3. ———. A lien for labor done on a railroad must be enforced against the whole road, not against so much only of the road as is benefited by the labor. *Ib.*

4. RAILROAD: NEGLECT OF STATUTORY DUTY: PLEADING: EVIDENCE. The omission to discharge any duty imposed by law upon common carriers in the management of their vehicles, in transporting persons and property, is negligence. The fact, therefore, that a railroad company's train men failed to ring the bell or sound the whistle as the train approached the crossing of a public road, may be given in evidence in a common law action against the company for negligently killing plaintiff's steer at the crossing, without being specially pleaded. If the action were on the statute, (Wag. Stat., p. 310, § 38,) it would be otherwise. *Goodwin v. The Chicago, Rock Island & Pacific Railroad Company,* 73.

5. ———: NEGLIGENCE: SPEED OF TRAINS. It is not negligence *per se* to run a train at the rate of twenty-five miles an hour across a public road in the country. *Ib.*

6. KILLING STOCK: PLEADING. The fact that the petition in an action against a railroad company for killing stock closes with a prayer for double damages, will not prevent recovery of single damages if the petition states a cause of action either at common law or under the 5th section of the Damage Act, and there is nothing besides the prayer to show that plaintiff intends to claim under the 43rd section of the Railroad Law. *Scott v. The St. Louis, Iron Mountain & Southern Railway Company,* 136.

7. NEGLIGENCE: CONTRIBUTORY NEGLIGENCE. It is well settled that it is such negligence for one to attempt to cross or get upon a railway track at a public crossing or elsewhere, without looking and listening for an approaching train, as precludes a recovery for an injury sustained by him from a passing train or locomotive, whether the company's negligence also contributed directly to produce the injury or not; but there is this qualification to this rule: If the negligence of the company, which contributed directly to cause the injury, occurred after the party injured was, or by the exercise of proper care might have been, discovered on the track by the company's trainmen in time to stop the train and avert the calamity, the company is liable, however gross the negligence of the injured party may have been in placing himself in danger. *Kelley v. The Hannibal & St. Joseph Railroad Company,* 138.

8. ———: UNLAWFUL SPEED. The mere fact that a train is run through a city at a greater rate of speed than is allowed by ordinance, will not authorize a party injured to recover. There must be

evidence connecting the violation of the ordinance with the injury, as a cause.

The same is true as to failure to comply with the law requiring the bell to be rung. *Ib.*

9. ——: CONTRIBUTORY NEGLIGENCE. It is not sufficient to exonerate a party from a charge of contributory negligence in attempting to cross a railway track in the face of an approaching locomotive, to show that he might reasonably have supposed that if the locomotive ran at its usual and lawful rate of speed for that place he could cross without harm. He has no more right to presume that the men in charge of the locomotive will obey the requirements of the law than they have, that he will obey the instinct of self-preservation and not unnecessarily thrust himself into danger. *Ib.*

10. ACTION FOR KILLING CATTLE: PLEADING: JUSTICE'S COURT. It is allowable in an action begun before a justice of the peace against a railroad company for killing cattle at a public crossing, to unite in one statement an allegation of failure to perform the statutory duty of ringing the bell and sounding the whistle, and an allegation of neglect in running the train; and plaintiff may recover upon proof of either or both, accompanied by evidence that the injury was due to defendant's default. *Lynn v. The Chicago, Rock Island & Pacific Railroad Company*, 167.

11. PASSENGER ALIGHTING FROM MOVING TRAIN: NEGLIGENCE. In an action by a passenger against a railroad company to recover for injuries sustained in alighting from a train as it was in the act of moving out from plaintiff 's station;

Held, that if the train was not stopped at the station a sufficient length of time to enable plaintiff, by the use of reasonable expedition, to get off before it was again started, and it was started while plaintiff was in the act of alighting, the company was liable. Or if insufficient time was allowed, but before plaintiff attempted to alight the train was started, and he then jumped from the train while its motion was still so slight as to be almost imperceptible and was injured, it was for the jury to determine from the age and physical condition of plaintiff and the attendant circumstances, whether his act constituted negligence. In such case the negligence of the company's servants in prematurely starting the train would support a recovery if the act of the passenger in jumping from the train should not be found by the jury to amount to concurring negligence.

Held, further, that if the train was stopped a sufficient length of time to enable plaintiff to conveniently alight, and without any fault of the company's servants, he failed to do so, and the conductor, not knowing and having no reason to suspect that plaintiff was in the act of alighting, caused the train to start while he was so alighting, then the company would not be liable.

Held, further, that it is not the duty of the conductor, in all cases, after allowing a sufficient time for passengers to get off, regard being had to their age, sex, physical condition and surroundings, to pass along the train and examine the platforms of each coach, to see whether there are any persons attempting to get off, before starting his train; but if he has reason to believe that any passenger, who has reached his destination, has not alighted, and though dilatory, may be in the act of alighting, and he starts his train without examination or inquiry, and such passenger is in the act of alighting

when the train is started and is thereby injured, the company will be liable; but when the conductor, after allowing sufficient time for passengers to alight, starts the train before the passenger is in the act of getting off, and after the train is in motion the passenger, who has been dilatory, jumps from the train and is injured, he cannot recover. *Straus v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 185.

12. CONTRIBUTORY NEGLIGENCE. Where concurring negligence of the plaintiff proximately contributes to produce the injury complained of, there can be no recovery, unless the injury is also the direct result of the omission of defendant, after becoming aware of the danger to which the plaintiff is exposed, to use proper care to avoid injuring him. *Ib.*

13. EVIDENCE: NEGLIGENCE. Under a general averment that the defendant, a railroad company, negligently killed plaintiff's animal evidence was received that the killing took place at a public crossing, and that neither the whistle was sounded nor the bell rung on the locomotive which did the damage, as it approached the crossing. *Held*, no error. *Schneider v. The Missouri Pacific Railway Company*, 295.

14. DOUBLE DAMAGES FOR KILLING STOCK: PLEADING. It is not essential to the sufficiency of the statement in an action against a railroad company to recover double damages for the killing of cattle, that it contain an express averment that the injury was occasioned by the failure of the company to erect and maintain fences as required by the statute. Any averment from which this may be inferred will be sufficient. *Bowen v. The Hannibal & St. Joseph Railroad Company*, 426.

15. STOPPING AND STARTING OF PASSENGER TRAINS. The rules laid down in *Straus v. R. R. Co., ante*, p. 185, affirmed. *Swigert v. The Hannibal & St. Joseph Railroad Company*, 475.

16. BOARDING MOVING TRAIN. It is not necessarily negligence to attempt to get on a train which has started from a station. The rate of speed and whether the train was stopped a sufficient length of time to enable passengers to get on, are circumstances to be considered in deciding the question. *Ib.*

17. ———. The fact that the conductor of a railroad train about to leave a station is induced by the conduct and conversation of a person on the station platform to believe that he does not intend to take passage on the train, will not relieve the company from liability for injuries received by such person in consequence of the train being started without giving him time to get on, if the conductor actually sees him attempting to get on when he gives the order to start. *Ib.*

18. DUTY TO STOP AT STATIONS. Railroad trains are bound to stop at stations a reasonable length of time to enable passengers to get on. *Ib.*

19. KILLING LIVE STOCK: ACTION FOR DOUBLE DAMAGES: PLEADING. In an action against a railroad company to recover double

damages for the killing of live stock, the statement filed with the justice of the peace alleged that the animals "strayed upon the track of said railroad on or near a farm crossing, at a point in the line of said railroad where said railroad was not fenced and where the crossing and cattle-guards were not made as the law requires; and that defendant so carelessly and negligently ran and managed its cars and locomotive that they ran against and over" the animals, killing them. *Held*, that, as the case was begun before a justice of the peace, these allegations were sufficient to support a recovery. *Belcher v. The Missouri Pacific Railway Company*, 514.

20. LIABILITY FOR KILLING OF CATTLE AT DEPOT. A railroad company is not responsible for cattle attracted to a depot by hay loaded on its cars and killed there by a train, provided the cars are not allowed to stand on the track an unreasonable length of time. It would be otherwise if they were attracted by hay scattered on the track in loading, and left there. *Schooling v. The St. Louis, Kansas City & Northern Railway Company*, 518.

21. PEDESTRIANS ON THE TRACK. The servants of a railroad company operating its trains in the country at night have a right to assume that the track is clear, and are under no obligations to provide for the safety of persons who may be on it. Even if they know the track is used as a foot-path, this will not exonerate any one so using it from the duty of taking proper care to avoid injury. *Yarnall v. The St. Louis, Kansas City & Northern Railway Company*, 575.

22. RUNNING OF TRAINS WITHIN CITIES: CARE REQUIRED. In running a railroad train within the limits of a town or city, care should always be used by the servants of the company—the degree to be proportioned to the danger to be apprehended of inflicting injury on others. At street crossings a high degree of vigilance should be exercised. The signals required by law for the protection of travelers upon the highway should be given, and the servants of the company in charge of the train should be at their posts, observant of the track, and ready at a moment's notice to avert, if possible, any apprehended danger. A less degree of vigilance will ordinarily be required between streets than at crossings or when the train is running longitudinally in a street; but some vigilance is required even there, and the degree will necessarily vary with the attendant circumstances. In any case, the requisite degree of vigilance may be properly designated by the words "ordinary care," that is, such care as would ordinarily be used by prudent persons performing a like service under similar circumstances. *Frick v. The St. Louis, Kansas City & Northern Railway Company*, 595.

23. CASE ADJUDGED: QUESTION FOR THE JURY. In a suit brought on behalf of a child two years of age against a railroad company to recover damages for injuries sustained by being run over by a train within the limits of a city and between two streets, the testimony was conflicting as to the length of time the child was on the track before she was run over, but the track was level, the view between the streets was unobstructed, the road was unfenced, there were dwellings on either side, there was a path leading across the track near the spot where the injury occurred, and the train was approaching a crossing. *Held*, that in view of all these circumstances, if the servants of the company in charge of the train saw, or by the exercise of ordinary care could have seen the child in time to avoid injuring

her, and failed to do so, the company was liable; and whether they were using such care was a question of fact for the jury. *Ib.*

24. RIGHT TO A CLEAR TRACK: LIABILITY FOR INJURIES. The general doctrine is that a railroad company is entitled to a clear track. But if there is reason to apprehend that the track may not be clear, the company's servants operating a train must not act upon the assumption that it is clear. If they do, the company will be responsible for the consequences. *Ib.*

25. NEGLIGENCE: INSTRUCTION. An instruction given by the trial court declared it to be the duty of railroad companies "to exercise the greatest caution and skill in the management of their business." *Held*, that although this degree of caution and skill can, perhaps, only be exacted when the relation of passenger and carrier exists, and the instruction may, therefore, be inapplicable to the present case, yet under the circumstances, (which are detailed in the opinion,) the judgment should not for this reason be reversed. *Ib.*

26. ———: DANGEROUS RATE OF SPEED: QUESTION FOR THE JURY. In cases where what constitutes a proper rate of speed for a railroad train depends upon the length and character of the train, the location and particular surroundings of the track and other circumstances, and no law or ordinance regulating the speed of trains is in evidence, whether the rate of speed is improper or dangerous is a question of fact for the jury. *Ib.*

27. LIABILITY FOR UNGUARDED TURN-TABLE. To hold a railroad company liable for the consequences of its negligence in leaving a turn-table unfastened and unguarded, it is not necessary to show that the company was the owner of the turn-table. It is sufficient if it appears that it was in the charge or under the control of the company. *Nagel v. The Missouri Pacific Railway Company*, 653.

28. ———: PLEADING. The petition in the present case stated in substance that the defendant railroad company "used and operated" a turn-table in connection with its railroad, and that it was the duty of the company to keep the turn-table locked and fastened. *Held*, that these averments were equivalent to a charge that the defendant controlled the turn-table. *Ib.*

29. INJURIES TO CHILDREN PLAYING ON TURN-TABLE. It is negligence on the part of a railroad company to omit to secure its turn-tables so that children cannot revolve them. If a child is injured in consequence of such an omission, the company will be liable, and the fact that the turn-table was being revolved by other children at the time will make no difference. *Ib.*

30. EXTENT OF DUTY TO MAINTAIN FENCES. If a railroad company has once erected a good and substantial fence along its road, as required by law, its only remaining duty is to use proper diligence in keeping the fence in suitable repair. If in spite of such diligence, animals come upon the track through breaks in the fence caused by others, and are injured, the company will not be liable. *Case v. The St. Louis & San Francisco Railroad Company*, 668.

31. KILLING ANIMALS: MEASURE OF DAMAGES. If the owner of an animal killed upon a railroad track uses or gives away the carcass, the

company will be entitled to have the value of the carcass deducted in estimating the damages. *Ib.*

IMPLIED POWERS OF RAILROAD PHYSICIANS TO BIND COMPANY. See Mayberry v. Chicago, Rock Island & Pacific Railroad Company, 492.

RATIFICATION.

VALIDATES PRIOR SUNDAY SALE. See Wilson v. Milligan, 41.

EQUIVALENT TO PREVIOUS AUTHORIZATION. See First National Bank of Springfield v. Fricke, 178.

RECEIPT.

PAROL EVIDENCE. So far as a receipt is a mere acknowledgment of payment, it is not conclusive; but if it is not a mere receipt, but constitutes and imports a contract, it is as any other written agreement, and cannot be contradicted or enlarged by parol testimony. *Carpenter v. Jamison*, 285.

RECEIVER.

1. MUST ACCOUNT FOR PROFITS. It is undoubtedly true that a receiver will not be permitted to make any profit for himself out of his receivership, and if he make any, will be required to account to his *cestui que trust* for it; but there is in this case no evidence to which to apply this principle. *Adair County v. Ownby*, 282.

2. SETTLEMENT OF ACCOUNTS: PRACTICE. Upon final settlement of the accounts of a receiver, he claimed the surplus remaining in his hands after the payment of all the debts, by virtue of an assignment to himself from the debtor, but the court below refused to try his right under the assignment, and ordered him to pay the surplus into court, to abide the further order of the court. *Held*, error. The questions arising upon the assignment should have been passed upon before the receiver was required to pay any money into court. *Ib.*

RECORD OF DEEDS.

1. UNRECORDED CHATTEL MORTGAGE: PURCHASER WITH NOTICE. A purchaser of personal property from a mortgageor in possession will hold it against the mortgage, if unrecorded, even though he had notice of it—at least, if it remains unrecorded an unreasonable length of time. *Wilson v. Milligan*, 41.

2. RECORD OF VOID DEED. The record of a deed which is void for insufficiency of description, is not constructive notice, and will not put a stranger upon inquiry. *Cass County v. Oldham*, 50.

COPY OF RECORD AS EVIDENCE. See Boogher v. Neece, 383.

LIMITATION RUNS IN FAVOR OF FRAUDULENT DEED FROM DATE OF RECORD. See Hughes v. Littrell, 573.

REMAINDERS.

ESTATES IN REMAINDER, SUBJECT TO EXECUTION. See White v. McPheeters, 286.

ROADS.

1. APPEALS IN ROAD OPENING: PRACTICE IN SUPREME COURT. This court cannot pronounce upon the legality of a proceeding for the opening of a road begun before a township board and brought thence by successive appeals through the county and circuit courts, unless the proceedings before the township board are incorporated in the record. *Anderson v. The Township Board of Myrtle Township*, 57.

2. ———: DESCRIPTION OF ROUTE. A judgment of the circuit court affirming an order of the county court for the opening of a road, made the road terminate in section 36, instead of section 26 as stated in the order of the county court. The call for section 26 was a patent mistake. *Held*, that the circuit court had the undoubted right to make the correction. *Ib.*

3. ROAD EXPENDITURES. If a road overseer exceeds, in his expenditures on the roads in his district, the amount provided by the county court for road purposes, he cannot recover the excess from the county. *State ex rel. Mount v. Bourn*, 473.

4. ———: OVERSEER'S PER DIEM. Where the road taxes are paid wholly in work or so nearly that there is not money enough in the district fund to pay the overseer's per diem compensation, he will be entitled to have the deficiency made good to him out of the county treasury. *Ib.*

ST. LOUIS.

1. COURTS: ST. LOUIS COUNTY: CONSTITUTIONAL LAW. No provision of the constitution of 1875 is violated by those sections of the act of 1877, dividing the State into judicial circuits, which detach the new county of St. Louis as formed by the scheme and charter from the Eighth judicial circuit, and attach it to the Nineteenth. The result of this change was to withdraw the county of St. Louis from the jurisdiction of the St. Louis criminal court, and to limit the jurisdiction of that court to the territory included in the city of St. Louis. HENRY and HOUGH, JJ., dissenting. *The State ex. rel. Harris v. Laughlin*, 147.

2. ST. LOUIS CRIMINAL COURT. Section 18 of the act establishing the criminal court of the city of St. Louis, (See R. S. 1879, p. 1509,) was

abrogated by sections 9 and 20 of the act of 1877 dividing the State into judicial circuits. *Ib.*

3. DAMAGES. The charter provision of 1870 that the city shall be liable for damages sustained by property owners by reason of any change of the grade of a street, applies to a case where the change does not extend to the whole width of the road-bed, if the alteration is such as to raise or lower the principal current of travel and transportation. *Stickford v. The City of St. Louis*, 309.

4. The recovery is not confined to such damage as results from some physical injury to the buildings; it is enough that a depreciation in value results from the change of grade. *Ib.*

5. LIABILITY FOR IMPUTED NEGLIGENCE: PROPER PARTIES UNDER THE CHARTER OF 1876. Section 9 of article 16 of the present charter of the city of St. Louis, rightly construed, means that where the city is liable to an action on account of the negligence or wrongful act of another who is also liable to an action for the same injury, the city and such other person must be joined as defendants, and there can be no judgment against the city unless judgment be also rendered against the other person who is also liable. But if a person be joined as defendant with the city who is found upon a trial not to be liable to an action by the plaintiff, this will not prevent a recovery against the city if the case be one in which an action could have been maintained against the city alone before the adoption of the charter. *Donoho v. The Vulcan Iron Works*, 401.

SALE.

ON SUNDAY. See Wilson v. Milligan, 41.

SCHOOLS.

1. DE FACTO BOARD OF EDUCATION: LIABILITY ON SCHOOL BONDS. A board of education which has long acted and been recognized as a legal body, cannot avoid liability on bonds issued on behalf of its school district, by showing that the district was not legally organized. *Franklin Ave. German Savings Inst. v. Board of Education of the Town of Roscoe*, 408.

2. SCHOOL BONDS: STATUTORY LIMIT ON SELLING PRICE. A board of education sold its bonds at ninety cents on the dollar, the purchaser charging and retaining out of the proceeds one per cent as a commission on the sale. A statute prohibited the bonds being sold at less than ninety cents on the dollar. *Held*, that this transaction was no violation of the statute. *Ib.*

3. SET-OFF: DEBTS DUE IN CAPACITY OF TRUSTEE. A demand due to a county for money borrowed of the county school fund may be set-off against a demand due by the county for services rendered on behalf of the same fund, and which by contract are to be paid for out of it. The county stands in the position of trustee as respects both demands. *Ib.*

4. SCHOOL TAXES. After the adoption of the constitution of 1875, and until the passage of the act of March 24th, 1877, (Sess. Acts 1877, p. 405,) no authority existed for levying taxes for school purposes in districts, exceeding forty cents on the $100 valuation. *The State v. The St. Louis, Kansas City & Northern Railway Company*. 526.

5. ——— : NOTICE OF ELECTION. Fifteen days' notice must be given of any election held under that act for the purpose of authorizing a tax exceeding forty cents on the $100 valuation. *Ib.*

6. SCHOOL TAXES: LEGISLATIVE POWER OVER THEM. The distribution of school taxes lies wholly within the control of the legislature, and in the absence of some special provision to the contrary, the law in force when the distribution is made must govern. Hence, where the law in force during the years for which certain school taxes were levied, directed them, when collected, to be distributed according to a certain plan, and before the same were collected the law was changed so as to require all school taxes to be distributed according to a different plan; *Held*, that the latter law must govern in the distribution. *School District No. 1 v. Weber*. 558.

SET-OFF.

1. A debt due to a defendant as guardian cannot be set off against a demand due by him individually. *Gansner v. Franks*, 64.

2. SET-OFF: DEBTS DUE IN CAPACITY OF TRUSTEE. A demand due to a county for money borrowed of the county school fund may be set-off against a demand due by the county for services rendered on behalf of the same fund, and which by contract are to be paid for out of it. The county stands in the position of trustee as respects both demands. *Smallwood v. Lafayette County*, 450.

SHERIFF.

SHERIFF'S DEED. See Carter v. Reeves, 104: Bray v. Marshall, 327: Neilson v. Sasse, 386.

HIS POWER TO RESELL: WHEN AND HOW TO BE EXERCISED. See Phillips v. Goldman, 686.

HIS FEES. See Gates v. Buck, 688.

SIGNIFICATION OF TERMS.

"COLLATERAL SECURITY." See Fisher v. Seligman, 13.

'TIMBER." See Hubbard v. Burton, 65.

"TRUSTEE." See Fisher v. Seligman, 13.

SPECIAL TAXES.

JUDGMENT ON TAX BILL: WHEN NOT RES JUDICATA. See Broadwell v. Kansas City, 213.

SPECIFIC PERFORMANCE.

The representatives of the covenantee may proceed in equity to compel specific performance, where the covenant is one which runs with the land. *Baker v. The City of St. Louis*, 671.

STATUTES.

1. CRIMINAL STATUTES: DISJUNCTIVE: CONJUNCTIVE. When a statute uses the disjunctive in enumerating offenses, it is competent in an indictment to aver their commission conjunctively. *The State v. Nations*, 53.

2. MUNICIPAL CHARTERS: JUDICIAL NOTICE. The courts do not take judicial notice of acts of municipal incorporation except where they are declared to be public statutes. *The Inhabitants of the Town of Butler v. Robinson*, 192.

SPECIAL LEGISLATION: UNCONSTITUTIONALITY OF. See State ex rel. Harris v. Herrmann, 340.

CHANGE OF TAX LAWS: EFFECT AS TO TAXES ALREADY LEVIED. See School District No. 1 v. Weber. 558.

STATUTES CONSTRUED.

REVISED STATUTES OF 1879.

Section 329, see page 112.
Section 354, see page 498.
Section 652, see page 236.
Section 697, see page 383.
Section 762, see page 424.
Sections 809, 810, 832, 834, 844, see page 660.
Section 1102, see page 30.
Section 1107, see page 471.
Section 1292, see page 303.
Section 1300, see page 303.
Section 1301, see pages 304, 389.
Section 1307, see page 304.
Section 1309, see pages 297, 304, 319.
Section 1335, see page 171.
Section 1531, see page 107.
Section 1535, see page 572.
Section 1547, see page 359.
Section 1561, see page 171.
Section 1808, see page 586.
Section 1848, see page 419.
Section 1870, see page 230.
Section 1886, see pages 233, 416.
Section 1918, see page 171.
Section 2123, see page 666.
Section 2259, see page 71.
Section 2384, see page 686.
Section 2393, see page 626.
Section 2394, see pages 613, 626.
Section 2742, see page 72.
Section 2872, see page 30.
Section 3056, see page 432.
Section 3124, see page 501.
Section 3239, see page 371.
Section 3280, see page 244.
Section 3281, see page 244.
Section 3282, see page 244.
Section 3567, see page 484.
Section 3582, see page 618.
Section 4596, see page 421.
Section 3655, see page 305.
Section 3724, see page 517.
Section 4014, see page 459.
Section 4998, see page 231.
Section 5843, see page 465.
Section 6836, see page 530.
Section 6880, see page 558.
Page 1509, § 18, see page 148.

WAGNER'S STATUTES 1872.

Page 291, § 13, see page 40.
Page 301, § 9, see page 14.
Page 310, § 38, see pages 73, 169.
Page 310, § 43, see pages 27, 136.
Page 442, § 24, see page 376.
Page 504, § 35, see page 53.
Page 520, § 5, see page 136.

Page 617, § 77, see page 508.
Page 625, § 13, see page 688.
Page 697, § 7, see page 338.
Page 698, §§ 7, 8, see page 60.
Page 699, § 8, see page 336.
Page 752, § 2, see page 212.
Page 791, § 11, see page 462.
Page 850, § 22, see page 432.
Page 1050, § 5, see page 229.

GENERAL STATUTES, 1865.

Page 687, § 1, see page 510.

REVISED STATUTES, 1855.

Page 246, § 23, see page 329.

ACTS OF 1881.

Page 172, § 4, see page 346.

ACTS OF 1877.

Page 207, —, see page 149.
Page 218, §§ 5, 6, 7, 8, see page 111.

Page 342, § 1, see page 521.
Page 355, § 6, see page 667.
Page 397, §§ 16, 17, see page 474.
Page 388, § 20, see page 474.
Page 405, see page 526.

ACTS OF 1875.

Page 130, —, see page 27.

ACTS OF 1874.

Page 196, see page 59.
Page 299, see page 530.

ACTS OF 1873.

Page 118, § 15, see page 196.
Page 119, § 17, see page 196.
Page 241, §§ 1, 3, see page 530.

ACTS OF 1868.

Page 54, —, see pages 370, 375.
Page 92, —, see pages 247, 250.

SUNDAY.

1. SUNDAY SALE: SUBSEQUENT RATIFICATION. A party having bought property on Sunday in consideration of an antecedent debt, during the succeeding week sent a receipt to the vendor for both the property and the debt. *Held*, a ratification of the contract. *Wilson v. Milligan*, 41.

2. SELLING LIQUOR ON SUNDAY. The statute against selling liquor on Sunday, (Wag. Stat., p. 504, § 35,) prohibits the sale of "any fermented *or* distilled liquor." An indictment charged defendant with selling "fermented *and* distilled liquor." *Held*, that this was no defect. The object of the statute is to prevent the sale of liquor on Sunday, whether the liquor be fermented or distilled or a mixture of both. *The State v. Nations*, 53.

TAXES.

1 MEAT-SHOP LICENSE: UNIFORMITY OF TAXATION. A license fee imposed upon the keepers of meat-shops is a tax, and must be uniform within the territorial limits of the authority imposing it. Const. 1875, art. 10, § 3. A city ordinance, therefore, which requires a license fee of $100 in one part of the city and $25 in the rest, is void. *The City of St. Louis v. Spiegel*, 145.

2. TAX BOOK: NO PROTECTION TO COLLECTOR: WHEN. In a county which had adopted the Township Organization law of 1873, after the tax-books of the current year had been delivered to the collector, the township board in one of the townships levied a special tax for township purposes, and the clerk of the county court, by order of the board and without any order of the county court, recalled the book for that township and extended the special tax upon it. *Held*, that this was without authority of law, that the tax was unlawful, and the tax book was no protection to the collector in enforcing payment. *Henry v. Bell*, 194.

3. MUNICIPAL TAXES. Municipal corporations have no power to grant exemption from or commutation of taxes, and a contract which undertakes to do so is void. *The State v. The Hannibal & St. Joseph Railroad Company*, 208.

4. SCHOOL TAXES. After the adoption of the constitution of 1875, and until the passage of the act of March 24th, 1877, (Sess. Acts, 1877, p. 405,) no authority existed for levying taxes for school purposes in districts, exceeding forty cents on the $100 valuation. *The State v. St. Louis, Kansas City & Northern Railway Company*, 526.

5. ———: NOTICE OF ELECTION. Fifteen days' notice must be given of any election held under that act for the purpose of authorizing a tax exceeding forty cents on the $100 valuation. *Ib.*

6. HANNIBAL CITY TAXES: LIEN FOR THEM: ENFORCEMENT THEREOF: GENERAL REVENUE LAW 1872. Since the passage of the general revenue law of 1872 the city of Hannibal has had no right of action in her own name to enforce the lien for delinquent city taxes. That lien, vested in the city by the charter of 1870, was taken from her by the above mentioned law and vested in the State and is to be enforced by suit in the name of the State. *The State ex rel. Van Brown v. Van Every*, 530.

7. ———. The charter of the city of Hannibal passed in 1873, as amended in 1874, conferred upon the city in addition to the power to levy taxes for general city purposes to the extent of one and a half per cent, a further power to levy taxes to pay the principal and interest of compromise bonds of the city to the extent of half of one per cent, and also a further power to levy a tax sufficient to pay any judgment that might be obtained against the city. Acts 1873, p. 241, §§ 1, 3; Acts 1874, p. 299. *Ib.*

8. CITY TAXES: SPECIAL LEVIES. When once a levy of taxes for general purposes has been made by a city, whether of less than the maximum rate allowed by law or not, no special levy even for an object that might properly be classed under the head of general purposes, can be made, in the absence of a provision of law authorizing it. *Ib.*

9. ———: CONSTITUTIONAL LAW. Section 11, article 10 of the constitution of 1875, operates a limitation upon the power of the general assembly to authorize cities and incorporated towns to levy taxes, but of its own force, confers no power to levy them. *Ib.*

10. TAXES: COLLECTOR'S CERTIFICATE AS EVIDENCE: CONSTITUTIONAL LAW. The provision of the present delinquent tax law which make the collector's certificate *prima facie* evidence of the facts therein recited cannot be held unconstitutional as impairing the right of trial by jury. R. S. 1879, § 6837. *Ib.*

11. DELINQUENT TAXES: JURISDICTION OF JUSTICE OF THE PEACE: RECORDER OF CITY OF HANNIBAL. The present delinquent tax law confers upon justices of the peace jurisdiction of suits to collect delinquent taxes. R. S. 1879, § 6836. In the city of Hannibal their jurisdiction is concurrent with that of the city recorder. *Ib.*

MANDAMUS AGAINST MUNICIPAL CORPORATION TO COMPEL LEVY. See State ex rel. Cassidy v. Slavens, 508.

SCHOOL TAXES: LEGISLATURE MAY CHANGE METHOD OF DISTRIBUTING THEM. School District No. 1 v. Weber, 558.

TENDER.

SHERIFF MUST TENDER DEED BEFORE RE-SELLING. See Phillips v. Goldman, 686.

TEXAS CATTLE ACT.

1. The Supreme Court of the United States in *Railroad Co. v. Husen*, 95 U. S. 4 65, and this court in *Gilmore v. Hannibal & St. Joseph R. R. Co.*, 67 Mo. 323, decided the 9th as well as the 1st section of the act restricting the importation of Texas, Mexican and Indian cattle, to be unconstitutional and void. *Urton v. Sherlock*, 247.

2. THE TEXAS CATTLE ACT: ATTACHMENT BOND: DAMAGES. The obligors in an attachment bond given in a suit brought under the Texas Cattle Act to recover damages allowed by that act, cannot plead the invalidity of the act in avoidance of their liability on the bond. *The State ex rel. Cantwell v. Stark*, 566.

TIMBER.

DEFINED. See Hubbard v. Burton, 65.

TORT.

1. WILLFULLY CAUSING HORSES TO BREAK AWAY: DAMAGE BY COLLISION. Defendant finding a team of horses hitched to a post in the street in front of his premises, willfully and intentionally threw a stream of water from a hose upon them, whereby they were frightened and breaking away ran down the street and collided with plaintiff's team. *Held*, that plaintiff was entitled to recover of defendant the damage caused by the collision. *Forney v. Geldmacher*, 113.

2. MUNICIPAL CORPORATION: TRESPASS BY CITY OFFICERS. If a city officer takes earth from private property and uses it in improving a street of the city without any provision in the charter or elsewhere authorizing such a proceeding, it is a trespass, for which the officer will be individually liable, but not the city. *Rowland v. The City of Gallatin*, 134.

3. LIABILITY FOR DAMAGES. If earth used in grading a street under a contract with the city be permitted to roll down upon the premises of an adjoining proprietor, to his damage, the city will be liable. *Broadwell v. The City of Kansas*, 213.

CORPORATION LIABLE FOR MALICIOUS PROSECUTION. See Boogher v. Life Association of America, 319.

TOWNSHIP BONDS.

The court re-affirms its former decisions holding township bonds issued in aid of railroads void. *Orr v. Lawrence County*, 246: *Hays v. Dowis*, 250.

TOWNSHIP ORGANIZATION.

COLLECTION OF TAXES IN COUNTIES UNDER. See Henry v. Bell, 194.

TRESPASS.

BY MUNICIPAL OFFICER. See Rowland v. The City of Gallatin, 134.

TRUSTS AND TRUSTEES.

1. TRUSTEE FOR BENEFIT OF CREDITORS: BOUND TO COLLECT RENTS. If a trustee for the benefit of creditors permits the debtor to take the rents and profits of the trust land, he will be held personally liable for their value, less taxes and the cost of repairs and necessary improvements, but without rests. *Ely v. Turpin*, 83.

2. CONVEYANCE BY MISTAKE: TRUSTS. If a husband having an estate in remainder in his wife's lands, without intending to convey his interest, join her in executing a deed in fee, a trust will arise in his favor which can be enforced against the grantee at the suit of the husband's creditors. *White v. McPheeters*, 286.

3. HUSBAND AND WIFE: TRUSTS. When a husband purchases real estate with his own money and causes the conveyance to be made to his wife, there is no presumption of a resulting trust, but *prima facie* this is a provision for the wife. *Seibold v. Chrisman*, 308.

5. TRUSTEE: ———. If one of two persons to whom an assignment is made for the benefit of creditors refuses to qualify, all the powers of the trust vest in the other, and he may proceed alone to collect the assets. *Shockley v. Fisher*, 498.

TRUSTEE STOCKHOLDER. See Fisher v. Seligman, 13.

VARIANCE.

IN PROOF OF FORGERY. See The State v. Chamberlain, 382.

VENDOR'S LIEN.

1. WAIVED BY TAKING INDEPENDENT SECURITY. Where the vendor of

land conveys the title and takes as security for the purchase money the obligations of a third party, in the absence of any agreement to the contrary, he will be deemed to have waived his vendor's lien, and it does not matter that the securities so taken are worthless. *Boyer v. Austin*, 81.

2. AGAINST INNOCENT PURCHASER FROM THE VENDEE. Plaintiffs sold their land to one B., agreeing to receive in part payment of the purchase money a note which afterward turned out to be forged. Before the conveyance was consummated defendant took B.'s purchase off his hands and received a deed direct from plaintiffs, paying plaintiffs in part in the forged note, but without knowing of the forgery. *Held*, that the defendant was entitled to be treated as an innocent purchaser from B., and that plaintiffs could not enforce against the land in his hands a vendor's lien for the amount of the note. *Brown v. Barrett*, 275.

VENUE.

CHANGE OF. See The State v. Underwood, 230.

PROOF OF: IN CRIMINAL CASES. See the State v. Hartnett, 251: see The State v. Burgess, 541.

WAIVER.

OF VENDOR'S LIEN: BY TAKING SECURITY. See Boyer v. Austin, 81.

WITNESSES.

1. CONTRACT: DEATH OF ONE PARTY. Where a third person sues upon a contract made for his benefit in the state of Louisiana (as by the law of that state he may) the fact that the other party to the contract is dead will not, in the courts of this State, prevent the party sued from testifying in his own favor. *Amonett v. Montague*, 43.

2. THE ACCUSED AS A WITNESS. Under the present statute, (R. S. 1879, § 1918,) a defendant in a criminal case offering himself as a witness in his own behalf, can be cross-examined only as to matters of which he testified in chief. *The State v. Porter*, 171.

3. The contumacy of a witness in persisting in answering a question after the court has ruled it out, furnishes no ground for reversal when the court has expressly instructed the jury to disregard the answer. *The State v. Butterfield*, 297.

4. PARTY TO CONTRACT, OTHER PARTY BEING DEAD. Where an administrator is a party to an action upon a contract made by his intestate, the adverse party will be admitted to testify in his own favor as to matters which have occurred since the appointment of the administrator. Qualifying *Ring v. Jamison*, 66 Mo. 424, and *Wood v. Matthews*, 73 Mo. 482. *Wade v. Hardy*, 394.

5. WIFE AS A WITNESS FOR HER HUSBAND. In order to render a married woman competent as a witness, under the statute, when her husband is a party, it must appear that the matter to which she is called to testify, was a business transaction which was had and conducted by her as the agent of her husband. The fact of her agency must be shown by some witness other than herself. *Wheeler & Wilson Manufacturing Company v. Tinsley*, 458.

6. WITNESSES IN CRIMINAL CASES. The State is not bound to call as witnesses all the persons who are cognizant of a criminal transaction. See *State v. Kilgore*, 70 Mo. 546. *The State v. Eaton*, 586.

TESTIMONY OF ABSENT WITNESSES IN CRIMINAL CASES: WHEN ADMITTED: ITS EFFECT. See The State v. Underwood, 230: see The State v. Hickman, 416.

RULES FOR THE GOVERNMENT

OF THE

SUPREME COURT OF MISSOURI,

ADOPTED AT THE APRIL TERM, 1877.

Chief Justice, his duty.

RULE 1. The Chief Justice shall superintend matters of order in the court room.

Motion to be written, signed and filed.

RULE 2. All motions in a cause shall be in writing, signed by counsel and filed of record.

Argument of motions.

RULE 3. No motion shall be argued unless by the direction of the court.

Taking record from clerk's office.

RULE 4. No member of the bar shall be permitted to take a record from the clerk's office without the written permission of some judge of the court.

Diminution of record, suggestion after joinder in error.

RULE 5. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

Application for certiorari.

RULE 6. Whenever a *certiorari* may be applied for, there shall be an affidavit of the defect in the transcript which it is designed to supply, and at least twenty-four hours' notice shall be given to the adverse party or his attorney previous to the making of the application.

Notices of writs of error.

RULE 7. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and be by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

Reviewing instructions.

RULE 8. In actions at law it shall not be necessary, for the purpose of reviewing in the Supreme Court the action of any circuit court or any other court, having, by statute, jurisdiction of civil cases in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the court of first instance be embodied in the bill of exceptions, but it shall be sufficient for the purpose of such review that the bill of exceptions state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instructions founded on it.

Bill of exceptions—whether there was evidence tending to prove an issue.

RULE 9. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the court of first instance shall be of opinion that there was such evidence, it shall be the duty of the court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed to be applicable to such fact or issue, and to except to the opinion of the court that the same tends to prove such fact or issue.

Bill of exceptions—whether there was evidence tending to prove an issue.

RULE 10. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions, detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the court that it does not so tend, which bill of exceptions shall be allowed by the court by which the cause is tried.

Exceptions to admission or exclusion of evidence.

RULE 11. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

Bill of exceptions in equity cases.

RULE 12. In cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

Rule as to making out transcripts.

RULE 13. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken or writ of error is sued out, shall not, (unless an exception is saved to the regularity of the process, or its execution, or to the acquiring by the court of jurisdiction in the cause,) in making out transcripts of the record for the Supreme Court, set out the original or any subsequent writ or the return thereof; but in lieu thereof shall say (e. g.) "summons issued October 2, 1871, executed October 5, 1871," and if any pleading be amended, the clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleading as part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter touching the organization of the court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by the bill of exceptions.

Presumptions in support of bills of exceptions.

RULE 14. The only purpose of a statement, in a bill of exceptions, that it sets out all the evidence in a cause, being that the Supreme Court may have before it the same matter which was decided by the court of first instance, it shall be presumed as a matter of fact in all bills of exceptions, for the future, that they contain all the evidence applicable to any particular ruling to which exception is saved.

Abstracts to be filed.

RULE 15. In all civil cases the appellant or plaintiff in error shall file in this court, on or before the day next preceding the day on which the cause is docketed for hearing, seven copies of an abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision. The appellant or plaintiff in error shall also deliver a copy of said extract to the attorney of the appellee or the defendant in error, ten days before the day on which the cause is docketed for hearing, and if the counsel for the appellee or defendant in error shall deem the abstract of the appellant or plaintiff in error imperfect or unfair, he may within eight days after receiving the same, deliver to the counsel of the appellant or plaintiff in error one copy, and to the clerk of this court seven copies of such further or additional abstract as he shall deem necessary to a full understanding of the questions presented to this court for decision, and hereafter the evidence of the service of such abstracts shall be filed with the same.

Briefs to be filed.

RULE 16. It shall be the duty of counsel in all cases to file with the clerk, on the day next preceding the day on which the cause is docketed for hearing, seven copies of a brief which shall contain a clear and concise statement of the matters in issue, and a further statement, in numerical order, of the points or legal propositions intended to be relied on in argument, accompanied by a citation of authorities supporting each proposition. To this may be added such argument as counsel may desire to make in writing; all of which shall be signed by counsel.

Citing authorities in briefs.

RULE 17. In citing authorities, in support of any proposition, it shall the duty of the counsel to give the names of the parties to any case cited from any report of the adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, section, paging and side paging shall be set forth.

Appellant's brief to allege errors complained of.

RULE 18. The brief filed on behalf of the appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted at the argument to errors not thus specified, unless for good cause shown the court shall otherwise direct.

Failure to comply with rules 15 and 16.

RULE 19. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with rules numbered 15 and 16, the court, when the cause is called for hearing, will dismiss the appeal or writ of error; or at the option of respondent or defendant in error, continue the cause at the costs of the party in default.

Agreed cases.

RULE 20. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligibly present to the Supreme Court, or any appellate court, the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in all appellate courts, and the judgment rendered in the court of first instance shall be affirmed or reversed according to the opinion entertained by the Supreme Court respecting the same.

Motion for rehearing.

RULE 21. Motions for a rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the court was not called through the neglect or inadvertence of counsel. Such motion must be filed within ten days after

the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel, but no motion for a rehearing shall be filed after the final adjournment of the court.

Motion for affirmance.

RULE 22. On motion for affirmance under section 49, article 13, chapter 110, Wagner's Statutes, the mere fact that the appellant has on file, or presents a copy of the transcript at the time such motion is made, shall not *of itself* be deemed "good cause" within the meaning of said section.

Former rules rescinded.

RULE 23. All rules not included in the foregoing enumeration are hereby rescinded

ADDITIONAL RULES.

RULE 24. No writ of error from this court to the court of appeals can be issued by the clerk of this court in vacation. All applications in term time for writs of error to the court of appeals, shall be accompanied by an affidavit of the attorney of record that the cause in which such writ of error is sued out, is one of which this court has appellate jurisdiction under section 12, of article 6 of the constitution; and such affidavit shall state the facts conferring such jurisdiction, and thereupon the clerk shall issue such writ. (*Adopted at the April term*, 1878.)

RULE 25. That hereafter, in no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause. (*Adopted at the October term*, 1878.)

RULE 26. A party, in any cause, filing a motion either to dismiss an appeal or writ of error, or to affirm the judgment, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegram, by letter or by written notice, and shall, on filing such motion, satisfy the court that such notice has been given. (*Adopted at the October term*, 1879.)